

Floyd Andrew Jensen
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FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

JAN 12 2009
D. MARK JONES, CLERK
BY DEPUTY CLERK

RECEIVED CLERK

JAN 09 2009

U.S. DISTRICT COURT

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

TON SERVICES, INC.,

Plaintiff,

v.

QWEST CORPORATION,

Defendant.

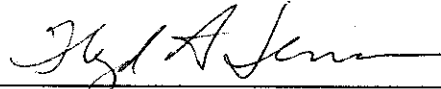
**JOINT MOTION AND ORDER TO
REOPEN ADMINISTRATIVELY
CLOSED CASE**

Civil No. 1:04CV00035 TS

Judge Stewart

Plaintiff TON Services, Inc. ("TON") and Defendant Qwest Corporation ("Qwest") hereby jointly move the Court to reopen this matter to enter an order of final dismissal. In its Order dated April 25, 2008 (Docket No. 102), the Court administratively stayed this case so that the Federal Communications Commission could rule on issues referred to it under the doctrine of primary jurisdiction. The parties recently entered a settlement agreement resolving all disputes in this litigation, and are concurrently filing a Stipulation and Order of Dismissal. The parties request that the Court grant this motion, reopen the case and enter the Stipulation and Order of Dismissal. Undersigned counsel for TON represents that counsel for Qwest have reviewed and concur with the filing of this motion.

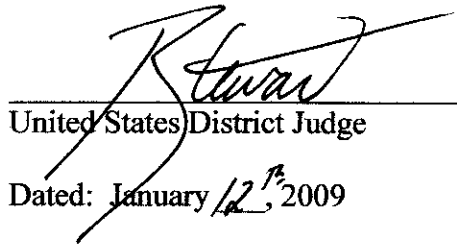
Respectfully submitted,



Floyd Andrew Jensen
FLOYD ANDREW JENSEN PLLC
999 South 1200 East, #100
Salt Lake City, Utah 84105
Telephone: (801) 582-5678

Dated: January 9, 2009

IT IS SO ORDERED



United States District Judge

Dated: January 12th, 2009

FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

RECEIVED CLERK

JAN 12 2009

JAN 09 2009

Floyd A. Jensen (#1672)
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BY D. MARK JONES, CLERK U.S. DISTRICT COURT
DEPUTY CLERK

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

TON SERVICES, INC.,

Plaintiff,

v.

QWEST CORPORATION,

Defendant.

**STIPULATION AND ORDER OF
DISMISSAL**

Civil No. 1:04CV00035 TS

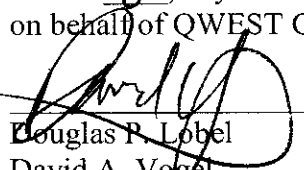
Judge Stewart

Pursuant to Fed. R. Civ. P. 41(a)(1)(A), Plaintiff TON Services, Inc., and
Defendant Qwest Corporation hereby stipulate and agree as follows:

1. The parties have entered into a Settlement Agreement effective January 6, 2009 (the "Agreement") in which they have mutually settled and resolved their disputes;
2. Pursuant to the Agreement, and based upon mutual covenants and obligations to each other provided in the Agreement, the Parties hereby stipulate and agree to the dismissal of this action with prejudice; and
3. The Court has and shall retain jurisdiction over the Agreement for the enforcement of any obligations thereunder or appropriate remedy of any breaches thereof.

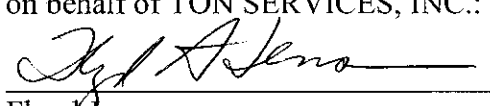
Respectfully submitted,

On this 8th, day of January, 2009;
on behalf of QWEST CORPORATION:



Douglas P. Lobel
David A. Vogel
COOLEY GODWARD KRONISH LLP
11951 Freedom Drive
Reston, Virginia 20190-5656
Telephone: (703) 456-8000
Facsimile: (703) 456-8100

On this 9th, day of January, 2009;
on behalf of TON SERVICES, INC.:



Floyd Jensen
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Blaine Benard (5661)
HOLMES ROBERTS & OWEN
299 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: (801) 521-5800
Facsimile: (801) 521-9639

It is so ordered.



United States District Judge

Dated: January 12th, 2009

FILED
U.S. DISTRICT COURT

2009 JAN 12 P 1:36

DISTRICT OF UTAH

BY: _____
DEPUTY CLERK

Kamie F. Brown (8520)
Katherine Conyers (12063)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Beneficial Tower
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

Attorneys for Defendant Reeder Flying Service

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

JOAN BEAN AND MERRILL BEAN,

Plaintiffs,

vs.

UNITED STATES OF AMERICA; UNITED
STATES DEPT. OF AGRICULTURE; FNU
COLSON; COULSON FROEST PRODUCTS,
LTD.; COULSON AIRCRANE LTD.;
CANADIAN AERO TECHNOLOGIES LTD;
PACIFIC HELICOPTER TOURS; REEDER
FLYING SERVICE; BILLINGS FLYING
SERVICE; CREW CONCEPTS; ROGERS
HELICOPTER; GEO-SEIS HELICOPTERS;
BRAINERD HELICOPTERS; WELLS FARGO
BLANK NORTHWEST; and FIRE-TROL
HOLDINGS,

Defendants.

**ORDER FOR EXTENSION OF
TIME FOR DEFENDANTS TO FILE
REPLY MEMORANDA IN
SUPPORT OF THEIR RESPECTIVE
MOTIONS TO DISMISS**

Honorable Dee Benson

Case No. 2:07-cv-00107

Upon consideration of the submitted Stipulation and Joint Motion for Extension of Time to File Reply Memoranda in Support and Their Respective Motions to Dismiss and good cause appearing therefore,

IT IS HEREBY ORDERED that Defendants Reeder Flying Service, Brainerd Helicopters, Fire-Trol Holding, L.L.C., Geo-Seis Helicopters and Roger Helicopters, may have

an extension of time up to and including January 19, 2009, within which to file their Reply Memoranda in Support of their respective Motions to Dismiss.

DATED this 12th day of January, 2009.

BY THE COURT:

A handwritten signature in cursive script that reads "Dee Benson". The signature is written in black ink and is positioned above a horizontal line.

Honorable Dee Benson
District Court Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. GREGORY WRIGHT, Defendant.	MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S REQUEST FOR REVIEW AND AMENDMENT OF MAGISTRATE'S ORDER OF DETENTION Case No. 2:07-CR-46 TS
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This matter came before the Court on January 9, 2009, for hearing on Defendant's Request for Review and Amendment of the Magistrate Judge's denial of his request to be released pending sentencing. Defendant pleaded guilty to one count of Possession of Methamphetamine With Intent to Distribute in violation of 21 U.S.C. § 841(a)(1) and is set to be sentenced on January 21, 2009.

On April 24, 2007, the Magistrate Judge ordered that Defendant be detained pretrial based on the Magistrate Judge's findings that there was a serious risk that Defendant would not appear and also a serious risk that Defendant would endanger the safety of another person or the community. On December 21, 2007, the Magistrate Judge denied

Defendant's Motion for Review of Detention. After his plea of guilty was entered, Defendant again sought a review of his detention. On December 15, 2008, the Magistrate Judge again denied the Motion. Defendant now seeks review and amendment of the latest denial.

This Court considers a defendant's request for a de novo review of the Magistrate Judge's Order detaining the defendant—technically “a motion for revocation or amendment of the order” detaining him—under 28 U.S.C. § 3145(b) and DUCrimR 57-16(a)(1).¹ This Court conducts its own de novo review of the detention issue giving no deference to the Magistrate's findings or conclusions.² In so doing, this Court may elect to start from scratch and take evidence—whether or not new evidence is proffered—and also may incorporate the record of the proceedings conducted by the magistrate judge, including any exhibits.³ Although an evidentiary hearing is not required, this Court's policy is to hold a hearing and allow the parties to present any information they choose in support of their positions on detention.

¹Providing that “any party is entitled to appeal a magistrate judge's order releasing or detaining a defendant.”

²DUCrimR 57-16(a)(1) (providing for de novo review of detention orders); *United States v. Lutz*, 207 F. Supp. 2d 1247, 1251 (D. Colo. 2002); *see also United States v. Cisneros*, 328 F.3d 610, 616 n.1 (10th Cir. 2003) (holding that district court's review under subsection (a) of §3145 is de novo).

³*Lutz*, 207 F. Supp. 2d at 1251.

The Bail Reform Act, “contemplates varying levels of scrutiny for defendants as they proceed through the court system.”⁴ “The different stages of the criminal justice process [are]: awaiting trial, pending sentencing, and pending appeal.”⁵ At each level, a defendant charged with a certain crimes specified under § 3142(f)(1)(A), (B) and (C)⁶ are subject to heightened burdens.

Because Defendant’s offense—Possession of Methamphetamine With Intent to Distribute in violation of 21 U.S.C. § 841(a)(1),—is punishable by a maximum term of life pursuant to 21 U.S.C. § 841(b)(1)(A), it is an offense described under § 3142(f)(1)(C).

Section 3143(a)(2)(A) and (B) of the Bail Reform Act governs release or detention of a defendant pending sentencing. Under § 3143(a)(2)(A) and (B), pending sentencing, a defendant like Mr. Wright who has been found guilty of one of the categories of offenses described § 3142(f)(1)(C), shall be “detained *unless*.”

- (A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; *or*
- (ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; *and*

⁴*United States v. Ingle*, 454 F.3d 1082, 1083 (10th Cir. 2006) (considering whether offense was crime of violence within meaning of Act).

⁵*Id.*

⁶See § 3142(f)(1)(A) (a “crime of violence”); (B) (“an offense for which the maximum sentence is life imprisonment or death”); and (C) (“an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled substances Act (21 U.S.C. § 801, et seq)” and other specified drug laws).

- (B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.⁷

Thus, persons convicted of offenses like Mr. Wright's offense have an additional hurdle in addition to the standard requirement that there be clear and convincing evidence that they are not likely to flee or pose a danger; they must also must meet one of the two conditions of subsection 3143(a)(2)(A).

There can be no motion for acquittal⁸ in this case and there is no allegation there will be or could be a motion for new trial,⁹ much less that there is a substantial likelihood that one would be granted.

The government has not recommended that no sentence of imprisonment be imposed on Mr. Wright. Therefore, Defendant is not eligible for release pending sentencing under § 3143(a)(2). Defendant argues that § 3143(a)(2) does not apply to a situation like his where he pleaded guilty rather than being convicted after trial. The Court finds that this subsection's plain language is applicable to any person "found guilty" under § 3142(f)(1)(C), and a trial is not required for such a finding. Defendant was found to be guilty of the offense at the end of his change of plea hearing.

Alternatively, Defendant's motion could be considered an appeal of the detention order. On appeal from a detention order, 18 U.S.C. § 3145(c) is applicable:

⁷18 U.S.C. § 3143(a)(2)(A)-(B) (emphasis added).

⁸See Fed. R. Crim. P. 29 (providing for motions for judgment of acquittal or for new trial in the contest of a criminal trial).

⁹See Fed. R. Crim. P. 33 (providing for motion for new trial).

(c) Appeal for a . . . detention order. —

* * *

A person subject to detention pursuant to section 3143(a)(2) . . . who meets the conditions set forth in section 3143(a)(1) . . . may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.¹⁰

In a recent unpublished case, *United States v. Wages*,¹¹ the Tenth Circuit construed § 3145(c):

“Exceptional” is defined as “being out of the ordinary: uncommon, rare.” Courts have agreed that “a case by case evaluation is essential.”¹²

To qualify for release under § 3145(c), Defendant would have to show exceptional circumstances and also that he meets the conditions set forth in section 3143(a)(1)—that a “judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the community if released.”¹³ There is a different burden on these issues pending sentencing than pretrial.¹⁴ Pending sentencing, a defendant has the

¹⁰18 U.S.C. § 3145(c).

¹¹271 Fed. Appx. 726, 727 10th Cir. (March 26, 2008).

¹²271 Fed.Appx. at 727 (quoting Webster's Third New Int'l Dictionary (Unabridged) 791 (G. & C. Merriam Co. 1976) and *United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir.1991) (referring to “a unique combination of circumstances giving rise to situations that are out of the ordinary”)) (additional citations omitted).

¹³In *Wages*, unlike the present case, there was such a finding that defendant was not likely to flee or to pose a danger to another person or the community and therefore he otherwise met the conditions of § 3143(a)(1) and therefore was eligible for consideration under § 3145(c).

¹⁴*United States v. Cisneros*, 328 F.3d 610, 616 (10th Cir. 2003)(holding that for pretrial release under 18 U.S.C. § 3142, the government’s burden to prove flight risk by

burden of showing a lack of risk of flight and lack of dangerousness by clear and convincing evidence. If Defendant makes that showing, he is eligible to show he should be released based on “exceptional circumstances.”

Defendant argues first that exceptional circumstances are shown because, under his plea agreement, if he violates any federal, state, or local law by fleeing or acting in a dangerous manner to an individual or the community, he will lose the benefits of his plea agreement, including the ability to appeal the ruling denying his Motion to Suppress. The Court finds such conditions to be common in plea agreements and are in no way out of the ordinary, uncommon, or rare as required in *Wages*.

Defendant also argues he should be released because his mother suffers from emphysema and that he would be in the constant company of other family members while released. In *Wages*, the defendant argued that the following were exceptional circumstances that could support a finding that he should be released: “his (1) age (53); (2) lack of prior criminal record; (3) use of a wheelchair and need for a special mattress to avoid pain; (4) limited ability to hear, . . . and (5) need to care for his elderly mother, who also is deaf and has only a limited ability to see.” The Tenth Circuit held that the circumstances, “either singly or in combination, did not constitute ‘exceptional reasons’ requiring release pending sentencing.”¹⁵ Thus, the need to care for an elderly or infirm

a preponderance of the evidence and its burden to prove danger to the community is by clear and convincing evidence).

¹⁵271 Fed. Appx. at 728.

mother is insufficient to show “exceptional circumstances.”¹⁶ The Court further finds that offers by family members to house and/or supervise a defendant in order that he be released is also not uncommon.

Because Defendant has not made a showing that he should be released under §3143(a)(2)(A) or shown exceptional circumstances under § 3145(c), the Court need not address the additional factors of flight risk or dangerousness, except to note that there was no evidence presented at the hearing in this matter that could alter the findings that Defendant was a flight risk and a danger to the community—findings made in the pretrial phase of the case when the government had the burden of establishing these factors.


It is therefore

ORDERED that Defendant’s Defendant’s Request for Review and Amendment of Magistrate’s Order of Detention (Docket No. 77), is DENIED. It is further

ORDERED that Defendant Gregory Wright shall remain DETAINED pending sentencing.

DATED January 9th, 2009.

BY THE COURT:



TED STEWART
United States District Judge

¹⁶*Id.* at 728.

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT
UTAH
2009 JAN 12 A 8:11
DISTRICT CLERK

NORTHERN DIVISION

District of

UNITED STATES OF AMERICA

V.

KEVIN MICHAEL LEITZ

JUDGMENT IN A CRIMINAL CASE

Case Number: DUTX108cr000003-001

USM Number: 15184-081

Lynn Donaldson

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Felony Information

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2425	Use of Interstate Facility to Transmit Information About a Minor		1s

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) the Indictment ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/6/2009

Date of Imposition of Judgment

Signature of Judge

The Honorable Ted Stewart

Name of Judge

U. S. District Judge

Title of Judge

1/9/2009

Date

DEFENDANT: KEVIN MICHAEL LEITZ
CASE NUMBER: DUTX108cr000003-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

33 months

☒ The court makes the following recommendations to the Bureau of Prisons:

1. Court recommends incarceration in the Seagoville, TX facility
2. Court recommends that defendant receive the appropriate medication for his ADHD

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ ☐ a.m. ☐ p.m. on _____
- ☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☒ before 2 p.m. on 3/6/2009
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: KEVIN MICHAEL LEITZ
CASE NUMBER: DUTX108cr000003-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

60 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☒ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: KEVIN MICHAEL LEITZ
CASE NUMBER: DUTX108cr000003-001

SPECIAL CONDITIONS OF SUPERVISION

- 1) The Court orders that the presentence report may be released to the state sex-offender registration agency if required for purposes of sex-offender registration.
- 2) The defendant shall participate in a sex-offender treatment program as directed by the probation office.
- 3) The defendant is restricted from contact with individuals who are under 18 years of age without adult supervision as approved by the probation office.
- 4) The defendant shall abide by the following occupational restrictions: Any employment shall be approved by the probation office. In addition, if third-party risks are identified, the probation office is authorized to inform the defendants employer of his supervision status.
- 5) The defendant shall not view, access, or possess sexually explicit materials in any format.
- 6) The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
- 7) The defendant shall participate in the Computer Restriction and Monitoring Program under a copayment plan. The defendant shall comply with the provisions outlined in the Restricted Internet Access Agreement.

DEFENDANT: KEVIN MICHAEL LEITZ
CASE NUMBER: DUTX108cr000003-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: KEVIN MICHAEL LEITZ
CASE NUMBER: DUTX108cr000003-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

CENTRAL

District of

UTAH 2009 JAN 12 A 8:22

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

DISTRICT OF UTAH

Alex Rex Ballard

Case Number: DUTX 1:08CR000015-003

BY: DEPUTY CLERK

USM Number: 15283-081

Jon D. Williams

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 27 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1028A	Aggravated Identity Theft		27

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 1, 8, 10-12, 14, 26 and 29 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/22/2008

Date of Imposition of Judgment



Signature of Judge

Clark Waddoups

U.S. District Judge

Name of Judge

Title of Judge

Date

January 7, 2009

DEFENDANT: Alex Rex Ballard
CASE NUMBER: DUTX 1:08CR000015-003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

24 months

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the dft participate in a substance abuse program while incarcerated ant that the dft be placed in a facility close to Utah.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 2/2/2009

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, w ith a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Alex Rex Ballard
CASE NUMBER: DUTX 1:08CR000015-003

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

12 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Alex Rex Ballard
CASE NUMBER: DUTX 1:08CR000015-003

SPECIAL CONDITIONS OF SUPERVISION

- 1) The defendant is to inform any employer or prospective employer of his current conviction and supervision status.
- 2) The defendant shall refrain from incurring new credit charges or opening additional lines of credit unless he is in compliance with any established payment schedule and obtains the approval of the probation office.
- 3) The defendant shall provide the probation office access to all requested financial information.
- 4) The defendant will submit to drug/alcohol testing as directed by the probation office, and pay a one-time \$115 fee to partially defray the costs of collection and testing.
- 5) The defendant shall participate in a substance-abuse evaluation and/or treatment under a co-payment plan as directed by the probation office. During the course of treatment, the defendant shall not consume alcohol nor frequent any establishment where alcohol is the primary item of order.
- 6) The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: Alex Rex Ballard
CASE NUMBER: DUTX 1:08CR000015-003

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$ 96,460.64

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
KROGER, PO Box 30650, SLC, UT 84130		\$8,573.79	
CERTEGY AT CERTEGY CHECK SERVICES		\$14.13	
Attn: C. Jacobson TA 12			
Fidelity National Information Services			
11601 Roosevelt Blvd, Petersburg, FL 33716			
BONNEVILLE COLLECTIONS, PO Box 150621		\$673.83	
MACEY'S, Attn: Jeff Wilson, 1850 W 2100 S		\$198.89	
Salt Lake City, UT 84119			

TOTALS	\$	<u>0.00</u>	\$	<u>9,460.64</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Alex Rex Ballard
CASE NUMBER: DUTX 1:08CR000015-003

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 9,560.64 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
- SPA of \$100 is due and payable forthwith. Restitution order in the amount of \$9,460.64 payable in accordance with a schedule established by the Bureau of Prisons Inmate Financial Responsibility Program while incarcerated. Upon release from imprisonment, payments will be made at a rate determined by the US Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages _____ - _____
are the
Statement of Reasons,
which will be docketed
separately as a sealed
document

UNITED STATES DISTRICT COURT

CENTRAL

District of

FILED
U.S. DISTRICT COURT
UTAH

UNITED STATES OF AMERICA

V.

Alex Rex Ballard

JUDGMENT IN A CRIMINAL CASE

Amended

Case Number: DUTX 1:08CR000015-003

USM Number: 15283-081

Jon D. Williams

Defendant's Attorney

NOV 12 A 10:11
DISTRICT OF UTAH
BY: DEPUTY CLERK

THE DEFENDANT:

☒ pleaded guilty to count(s) 27 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
-----------------	-------------------	---------------	-------

18 USC § 1028A

Aggravated Identity Theft

27

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 1, 8, 10-12, 14, and 26 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/22/2008

Date of Imposition of Judgment

Clark Waddoups
Signature of Judge

Clark Waddoups

Name of Judge

U.S. District Judge

Title of Judge

Date

1/12/09

DEFENDANT: Alex Rex Ballard
CASE NUMBER: DUTX 1:08CR000015-003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

24 months

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the dft participate in a substance abuse program while incarcerated ant that the dft be placed in a facility close to Utah.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 2/2/2009.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Alex Rex Ballard
CASE NUMBER: DUTX 1:08CR000015-003

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

12 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Alex Rex Ballard
CASE NUMBER: DUTX 1:08CR000015-003

SPECIAL CONDITIONS OF SUPERVISION

- 1) The defendant is to inform any employer or prospective employer of his current conviction and supervision status.
- 2) The defendant shall refrain from incurring new credit charges or opening additional lines of credit unless he is in compliance with any established payment schedule and obtains the approval of the probation office.
- 3) The defendant shall provide the probation office access to all requested financial information.
- 4) The defendant will submit to drug/alcohol testing as directed by the probation office, and pay a one-time \$115 fee to partially defray the costs of collection and testing.
- 5) The defendant shall participate in a substance-abuse evaluation and/or treatment under a co-payment plan as directed by the probation office. During the course of treatment, the defendant shall not consume alcohol nor frequent any establishment where alcohol is the primary item of order.
- 6) The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: Alex Rex Ballard
 CASE NUMBER: DUTX 1:08CR000015-003

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$ 9,460.64

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
KROGER, PO Box 30650, SLC, UT 84130		\$8,573.79	
CERTEGY AT CERTEGY CHECK SERVICES		\$14.13	
Attn: C. Jacobson TA 12			
Fidelity National Information Services			
11601 Roosevelt Blvd, Petersburg, FL 33716			
BONNEVILLE COLLECTIONS, PO Box 150621		\$673.83	
MACEY'S, Attn: Jeff Wilson, 1850 W 2100 S		\$198.89	
Salt Lake City, UT 84119			

TOTALS	\$	<u>0.00</u>	\$	<u>9,460.64</u>
---------------	----	-------------	----	-----------------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Alex Rex Ballard
CASE NUMBER: DUTX 1:08CR000015-003

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 9,560.64 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
SPA of \$100 is due and payable forthwith. Restitution order in the amount of \$9,460.64 payable in accordance with a schedule established by the Bureau of Prisons Inmate Financial Responsibility Program while incarcerated. Upon release from imprisonment, payments will be made at a rate determined by the US Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages ____ - ____

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

UNITED STATES DISTRICT COURT

FILED

2009 JAN 12 P 2:34

Northern

District of

UNITED STATES OF AMERICA

V.

Jose Ulloa-Duarte

JUDGMENT IN A CRIMINAL CASE

DISTRICT OF UTAH

Case Number: DUTX 1:08-cr-000123-001

USM Number: 15856-081

Carlos A. Garcia

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) I-Indictment

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8USC§1326	Re-Entry of a Previously Removed Alien		1

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/8/2009

Date of Imposition of Judgment

Dee Benson
Signature of Judge

Dee Benson

Name of Judge

U.S. District Judge

Title of Judge

1/12/2009

Date

DEFENDANT: Jose Ulloa-Duarte
CASE NUMBER: DUTX 1:08-cr-000123-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

24 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be placed in Arizona, for family visitations.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Jose Ulloa-Duarte
CASE NUMBER: DUTX 1:08-cr-000123-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Jose Ulloa-Duarte
CASE NUMBER: DUTX 1:08-cr-000123-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not reenter the United States illegally. In the event that the defendant should be released from confinement without being deported, he shall contact the United States Probation Office in the district of release within 72 hours of release. If the defendant returns to the United States during the period of supervision after being deported, he is instructed to contact the United States Probation Office in the District of Utah within 72 hours of his arrival in the United States.

DEFENDANT: Jose Ulloa-Duarte
CASE NUMBER: DUTX 1:08-cr-000123-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Jose Ulloa-Duarte
CASE NUMBER: DUTX 1:08-cr-000123-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages ____ - ____

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

NORTHERN DIVISION

District of

UTAH

UNITED STATES OF AMERICA

V.

LUIZ TAVARES-GUTIERREZ

JUDGMENT IN A CRIMINAL CASE

DISTRICT OF UTAH

Case Number: DUTX108CR000124-001

USM Number: 11953-081

Spencer Rice

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8 U.S.C. § 1326	Reentry of a Previously Removed Alien		1

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/7/2009

Date of Imposition of Judgment

Signature of Judge

The Honorable Ted Stewart

Name of Judge

U. S. District Judge

Title of Judge

1/9/2009

Date

DEFENDANT: LUIZ TAVARES-GUTIERREZ
CASE NUMBER: DUTX108CR000124-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

70 months

☒ The court makes the following recommendations to the Bureau of Prisons:

Incarceration in AZ

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: LUIZ TAVARES-GUTIERREZ
CASE NUMBER: DUTX108CR000124-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: LUIZ TAVARES-GUTIERREZ
CASE NUMBER: DUTX108CR000124-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not re-enter the United States illegally. In the event that the defendant should be released from confinement without being deported, he shall contact the United States Probation Office in the district of release within 72 hours of release. If the defendant returns to the United States during the period of supervision after being deported, he is instructed to contact the United States Probation Office in the District of Utah within 72 hours of arrival in the United States.

DEFENDANT: LUIZ TAVARES-GUTIERREZ
CASE NUMBER: DUTX108CR000124-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ 0.00	\$ 0.00	
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LUIZ TAVARES-GUTIERREZ
CASE NUMBER: DUTX108CR000124-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

Northern

District of

Utah

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

Elias Cardona-Chapa

DISTRICT OF UTAH

Case Number: DUTX 1:08-cr-00126-001

USM Number: 26881-013

DEPUTY CLERK

Carlos A. Garcia

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) I-Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8USC§1326	Re-Entry of a Previously Removed Alien		1

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/8/2009

Date of Imposition of Judgment

Dee Benson

Signature of Judge

Dee Benson

Name of Judge

U.S. District Judge

Title of Judge

1/12/2009

Date

DEFENDANT: Elias Cardona-Chapa
CASE NUMBER: DUTX 1:08-cr-000126-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

24 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be placed in Arizona, for family visitations.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Elias Cardona-Chapa
CASE NUMBER: DUTX 1:08-cr-000126-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Elias Cardona-Chapa
CASE NUMBER: DUTX 1:08-cr-000126-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not reenter the United States illegally. In the event that the defendant should be released from confinement without being deported, he shall contact the United States Probation Office in the district of release within 72 hours of release. If the defendant returns to the United States during the period of supervision after being deported, he is instructed to contact the United States Probation Office in the District of Utah within 72 hours of his arrival in the United States.

CRIMINAL MONETARY PENALTIES

TOTALS	\$	<u>Assessment</u>	\$	<u>Fine</u>	\$	<u>Restitution</u>
	100.00					

- | <u>Name of Payee</u> | <u>Total Loss*</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|----------------------|--------------------|----------------------------|-------------------------------|
|----------------------|--------------------|----------------------------|-------------------------------|

[illegible]

TOTALS	\$	0.00	\$	0.00
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- * Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Elias Cardona-Chapa
CASE NUMBER: DUTX 1:08-cr-000126-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages ____ - ____
are the
Statement of Reasons,
which will be docketed
separately as a sealed
document

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

MURIEL S. DERR,
Plaintiff,

vs.

MERVYN'S LLC, MERVYN'S LONG
TERM GROUP DISABILITY INCOME
POLICY, and LIBERTY LIFE ASSURANCE
COMPANY OF BOSTON,
Defendant.

**ORDER GIVING LEAVE FOR
PLAINTIFF TO FILE AN
AMENDED COMPLAINT**

Case No. 1:08-CV-94-SA

Based on the parties' motion and good cause appearing, **IT IS HEREBY ORDERED** that the parties' Stipulated Motion to File Amended Complaint (Docket Entry #17) is **GRANTED**. Plaintiff shall file her Amended Complaint within five (5) business days of the entry of this Order..

DATED this 12th day of January, 2009.

BY THE COURT:



Samuel Alba
United States Magistrate Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

MURIEL S. DERR,
Plaintiff,

vs.

MERVYN'S LLC, MERVYN'S LONG
TERM GROUP DISABILITY INCOME
POLICY, and LIBERTY LIFE ASSURANCE
COMPANY OF BOSTON,
Defendant.

**ORDER OF DISMISSAL OF
DEFENDANT MERVYN'S LLC
WITH PREJUDICE**

Case No. 1:08-CV-94-SA

Based on the parties' motion and good cause appearing, **IT IS HEREBY ORDERED**
that the parties' Stipulated Motion to Dismiss Mervyn's LLC With Prejudice (Docket Entry #16)
is **GRANTED**. Defendant Mervyn's LLC is dismissed with prejudice.

DATED this 12th day of January, 2009.

BY THE COURT:



Samuel Alba
United States Magistrate Judge

STEVEN B. KILLPACK, Utah Federal Defender (#1808)
NATALIE A. BENSON, Attorney for Defendant (#11098)
UTAH FEDERAL DEFENDER OFFICE
46 West Broadway, Suite 110
Salt Lake City, Utah 84010
Telephone: (801) 524-4010
Facsimile: (801) 524-4023
Attorneys for Defendant

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TRISA LYNN JOHNSON,

Defendant.

**ORDER CONTINUING
SUPERVISED RELEASE
VIOLATION HEARING**

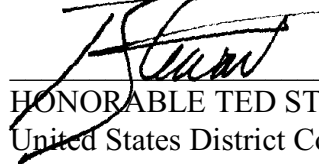
Case No: 2:04-CR-376-TS

Based on Defendant's Motion and for good cause appearing therefore, **IT IS HEREBY
ORDERED THAT:**

The Supervised Release Hearing scheduled for January 8, 2009 at 3:00 p.m. will be
continued until April 9, 2009, at 2:30 p.m.

DATED this 12th day of January, 2009.

BY THE COURT



HONORABLE TED STEWART
United States District Court Judge

FILED
U.S. DISTRICT COURT

2009 JAN 12 P 1:36

DISTRICT OF UTAH

Civil No. ~~204-CV-00205-DB~~
DEPUTY CLERK

V.

ORDER EXTENDING TIME TO RESPOND
TO MOTIONS

Defendants.

DATED this 12th day of January, 2009.

Dee Benson

- 1 -

FILED
U.S. DISTRICT COURT
2009 JAN 12 P 1:36
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

Dee Benson
THE HONORABLE DEE BENSON
DISTRICT COURT JUDGE

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

INTERNATIONAL AUTOMATED
SYSTEMS, INC.

Plaintiff,

vs.

IBM; IBM CORPORATION; IBM
PERSONAL COMPUTING DIVISION;
LENOVO (UNITED STATES) INC.;
LENOVO GROUP LTD.; UPEK, INC.; and
JOHN DOES 1-20

Defendants and Counterclaimants.

MEMORANDUM DECISION AND
ORDER

Case No. 2:06-CV-00072-DB

I. INTRODUCTION

On January 28, 1997, after several unsuccessful attempts, the U.S. Patent Office finally granted inventor Neldon Johnson U.S. Patent No. 5,598,474 (the '474 patent) which allowed Johnson to enter the already crowded field of automatic fingerprint identification. Not surprisingly, Johnson's patent described an apparatus capable of reading a fingerprint, identifying its unique features (and their relative positions), and converting that information into a unique code for verification purposes. Equally unsurprising is that Johnson and his company,

International Automated Systems, Inc. (IAS), eventually identified several other players in this crowded field who were potentially infringing upon the '474 patent. In 2006, IAS filed lawsuits against several parties, including UPEK, Inc, alleging infringement of the '474 patent.

This is the last of those lawsuits, and before this Court are five motions: (1) UPEK's Motion for Summary Judgment for Unenforceability under 35 U.S.C. § 285, (2) UPEK's Motion for Attorney's Fees and Costs, (3) IAS's Motion to Dismiss for Lack of Jurisdiction, (4) UPEK's Motion to Strike the Declaration of Craig J. Madson in Support of IAS's Motion in Opposition to UPEK's Motion for Attorney's Fees and Costs, and (5) UPEK's Motion to Strike the Affidavit of Craig J. Madson in Support of IAS's Motion in Opposition to UPEK's Motion for Summary Judgment. This Court held a hearing covering these motions on Friday October 31, 2008. IAS was represented by Ryan J. Marton and Bryan A. Kohm; UPEK was represented by Jeffrey A. Miller, Sugithra Somasekar, and Joseph Barrett. After thorough review and consideration of the briefs submitted by the parties and the oral arguments presented by counsel, the Court enters the following memorandum decision and order.

II. FACTUAL BACKGROUND

A. Prosecution History of '474

IAS obtained the '474 patent, directed to an automated biometric identification system, on January 28, 1997. The patent issued from United States Patent Application Serial No. 08/402,014 ('014), which was filed on March 10, 1995. The '014 application was a continuation-in-part application of U.S. Patent Application Serial No. 08/218,743 ('743), which was filed on March 29, 1994. The '743 application in essence claimed a system which could: (1) read the

characteristics from a body part; (2) transfer the characteristics to a camera means; (3) transfer the characteristics from the camera means to a digitizer to produce a digital number; (4) transmit the digital characteristics to a computer; (5) imprint the digital characteristics on a magnetic strip of an identification card. *See Miller Decl.*, Ex. 6, Dkt. No. 118.

The '743 application was rejected by the PTO on two grounds. First, the PTO rejected all of the claims under 35 U.S.C. § 112 as being indefinite for "failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention." *Miller Decl.*, Ex. 7, Dkt. No. 118. Specifically, the PTO found unclear the claims' use of the language "body," "body part," "characteristics," and "magnetic strips." *Id.* Second, the PTO also rejected all of the claims under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,811,408 ('408); U.S. Patent No. 4,993,068 ('068); and U.S. Patent No. 4,785,290 ('290). The PTO found that all of the above prior art addressed the storage of biocharacteristic data in a manner similar to the apparatus claimed by the '743 application.

On March 29, 1994, Johnson filed an amendment with the PTO. The amendment made several small changes in the wording of the claims in an attempt to satisfy the PTO. For example, the amendment changed the first step claimed in claim one from "reading the characteristics from a body part with an optical scanning device," to "an optical scanning device for reading the characteristics from a body part to produce an image of the body part characteristics." *Compare Miller Decl.*, Ex. 6, Dkt. No. 118 *with Miller Decl.*, Ex. 9, Dkt. No. 118. The amendment also attempted to differentiate the prior art mentioned by the PTO in its rejection. Johnson highlighted that though some of the prior art taught a process for converting a fingerprint image

into a digital number, only his invention was able to condense this relatively large amount of digital information into a unique number capable of being stored on the magnetic strip of an identification card. Rather than storing the entire image, Johnson's invention was able to convert the image into a smaller data set which in turn could be readily compared to live fingerprint data to ascertain whether the identity stored on the card matched the identity of the card's user.

On December 15, 1994, the PTO rejected Johnson's amended application in full, again for several reasons. First, the PTO found that correction of the drawings was required to reflect the newly-added apparatus so that the "correspondence between the illustrated elements and the claimed elements [is] clear." *Miller Decl.*, Ex. 10, Dkt. No. 118. Second, the PTO again rejected several of the claims under 35 U.S.C. § 102(b) as being anticipated by the '068 patent. In essence, the PTO was unable to distinguish the digital number claimed in the '068 patent, which represented the entire digitized image of the body part, from the digital number claimed in the '743 application, which represented a smaller subset of data culled from the same digitized image. Further, the PTO stated that the claim language did not foreclose the possibility that more than one digital number might be produced from an image, asserting in essence that the number produced might be non-unique. Finally, the PTO also rejected several claims as unpatentable under 35 U.S.C. § 103. The PTO concluded that the use of a "prism" or an "optical scanning device" was obvious to a person having ordinary skill in the art.

Subsequent to the PTO's rejection, Johnson abandoned the '743 application and, on March 10, 1995, attempted to respond to the PTO's concerns in the continuation-in-part '014 application. In the '014 application, Johnson went to great lengths to differentiate the digital

number claimed by the '014 application from the number claimed in the '068 patent.

Specifically, the application stated:

U.S. Patent No. 4,993,068 does not identify the use of a computer program to find the unique biological identifying parts and separating them from the other parts of the image. It uses the whole biological image to compare it with the live image. This is where the present invention defers[sic]. The present invention deals with first separating and or finding and identifying the unique patterns and identifying marks from the rest of the biological image. It finds only the unique parts of the biometrics image and then identifies them by giving them a unique identification number or code and then combines them into a unique identification code. The unique identification code is composed of a location reference and a biologically unique identifiable mark.

Miller Decl., Ex. 12, Dkt. No. 118.

The '014 application also sought to distinguish other prior art, much of which also involved some form of a “unique code.”¹ For example, the application disclosed U.S. Patent No. 4,995,086 ('086), which taught a “characteristic number procedure” by which the data quantity contained in a raw fingerprint image could be reduced to a more manageable size. *Kohm Decl.*, Ex. B, Dkt. No. 159. The procedure taught in the '086 patent analyzed the “quality and sequence” of a “few significant features,” such as “unambiguous vortices, arcs, circular arcs, double vortices, crossings and other papillary line forms.” *Id.* at col. 3, lns. 10-28. Further, the '086 patent also contemplated several systems by which the features could be coded, *see id.* at col. 3, lns. 29-35, and that one “known recognition system” in particular could detect “approximately 40 features,” and used an algorithm based primarily upon “relative positions” to

¹ Indeed, it is hard to imagine a useful fingerprint reader that would not involve the generation of a “unique code.” The value of a fingerprint lies precisely in its uniqueness. An apparatus capable of deriving a non-unique code from a unique fingerprint would be completely useless.

more effectively reduce the data quantity, *see id.* at col. 5, lns. 65-69, col 6, lns. 1-12.

The '014 application did not, however, disclose U.S. Patent No. 4,325,570 ('570), which taught a fingerprint identification system which also generated a unique code by relying upon the relative locations of certain unique characteristics. Two months before submitting his '014 application, Johnson learned of the '570 patent through a patentability search he conducted in association with a distinct, but substantially similar, patent application. The '570 patent stated:

A significant part of the present invention involves the generating of an identifier corresponding to the fingerprint 16 such that the identifier can be compared to the fingerprint to determine their correlation. The identifier is made up of a series of alpha, numeric, or alpha-numeric designations or symbols, with each individual designation representing a selected fingerprint characteristic in respective squares of grid 18.

Miller Decl., Ex. 4, Dkt. No. 118, col. 3, lns. 13-20.

The alpha-numeric identifier claimed in the '570 patent and the characteristic number procedure claimed in the '086 patent were quite similar to the methods claimed in the '014 application. The '014 application, however, purported to also teach quality determination and enhancement procedures to set it apart from this prior art.² Specifically, the '014 application, in distinguishing the prior art, stated that “[n]one of the above mentioned patents uses any means to determine the quality of the image being read or the quality of the actual biological part. Neither do they provide for a computer program to make enhancements to those images in order to

² Though the '474 patent was ultimately invalidated by this Court in a companion case because image quality determination and enhancement were not included in the claims, *see Memorandum Opinion and Order*, January 2, 2008, at *32-37, there is substantial evidence that Johnson regarded them as vital components of his invention, *id.* at 32 (noting that IAS admitted that without image quality determination and enhancement, the '474 patent was likely invalid under § 112).

compensate for bad or poor reads and or poor characteristics of the actual biological part.” *Miller Decl.*, Ex. 12, Dkt. No. 118. The importance of quality determination and enhancement is repeatedly stated throughout the application. For example, the application also states that “[d]etermining the quality of the scanned image is critical to the process of comparing different biological parts or images of fingerprints,” *id.* at col. 7, lns. 35-61, that obtaining an exact read is impossible “without a program that knows how to make the proper enhancements,” *id.*, and that process for enhancing images “could be used in all types of biological comparator devices and should improve all of the current patents,” *id.* at col. 12, lns. 46-54. The ‘014 application also included a claim which expressly taught a “means to enhance the fingerprint image through a computer program.”

The PTO rejected all of the claims found in the ‘014 application on October 12, 1995. The PTO found several of the terms of the claims unclear, indefinite, and lacking antecedent basis. In response, Johnson filed at least four more amendments on January 9, 1996, April 2, 1996, June 21, 1996, and July 11, 1996. At some point during the amendment process, Johnson cancelled the claim upon which the enhancement claim depended, unsuccessfully attempted to amend the enhancement claim to make it dependant on other, remaining claims, and ultimately cancelled the enhancement claim. Though is it unclear exactly why the PTO finally relented, it ultimately granted the ‘474 patent on January 28, 1997.

The claims of the ‘474 patent as issued are as follows:

1. An apparatus for reading unique identifying characteristics from a body part, transmitting said unique identifying characteristics to a computer, digitizing the characteristics, and then having a computer with the ability to separate out from the whole unique identifying characteristics into separate unique identifying characteristics

and then distinguish and identify the different unique characteristics and then giving each of those unique identifying characteristics a unique code that represents the unique identifying characteristics type and location relative to other unique identifying characteristics for the purpose of affixing them on an identification document, or electronic storage medium including the following components:

means for transferring the characteristics from a camera means to a digitizer;

means for transferring the characteristics from the digitizer to the computer for the purpose of separating out from the whole image each unique identifying characteristic;

means for identifying each unique characteristic by type;

means for giving each identifying characteristic its own unique code which is comprised of the type and also relative location;

means for transmitting the unique identification characteristics code to the computer for storage and processing; and

means for imprinting the unique identification characteristics codes on the electronic storage medium.

2. An apparatus as set forth in claim 1, including the components of:

means for reading the characteristics from a live impression of a body part;

means for digitizing the live impression;

means for transmitting said digital impression to a computer;

means for separating out from the characteristics its unique identifying characteristics and identifying them by type and position;

means for comparing in the computer a set of stored unique identification characteristic codes the codes derived from the live digitized impressions of the live body part to establish identity of both the inputs: and

means for sending a signal to verify the identity of the person evidencing the live impression of the body part.

3. An apparatus as set forth in claim 2, wherein the reading of the characteristics from a live impression of a body part uses a lens that has the capacity to have within itself internal reflection that when a certain type of material touches the outside portion of the lens that at the point of touching the internal reflection is destroyed and an image of where the internal reflection is destroyed is transmitted to a camera.

4. An apparatus as set forth in claim 3, wherein the lens is a prism.

5. An apparatus as set forth in claim 2, wherein said body part is a fingerprint.

6. An apparatus as set forth in claim 2, wherein said body part is a handprint.

7. An apparatus as set forth in claim 2, including printing an impression of the body part on a transactional document.

8. An apparatus as set forth in claim 1, wherein the camera means is a video camera.
9. An apparatus as set forth in claim 1, wherein said body part is a fingerprint.
10. An apparatus as set forth in claim 1, wherein said body part is a handprint.

Though reference to image quality determination and enhancement is completely absent from the claims of the '474 patent, the specification section of the patent contained language drawing attention to the importance of the quality determination and enhancement features.

IAS's failure to include any reference to image quality determination and enhancement in the claims, however, ultimately led this Court to invalidate the '474 patent in IAS's companion case against Digital Persona. *See Memorandum Opinion and Order*, January 2, 2008, Dkt. 79, at 44 ("[T]he claims are invalid under the "regards an invention" requirement because they do not require image quality determination and enhancement, even though that is clearly what [Johnson] regarded as his invention, shown by the specification, a system where it is crucial to use image enhancement in order to identify the unique characteristics and assign a code that can be stored on 100 bytes."). Thus, though the specification was able to successfully distinguish prior art--such as the '068 patent--based upon the notion of quality determination and enhancement, the resulting patent's failure to incorporate that notion in its claims, combined with the specification's failure to teach any system that could function without image determination and enhancement, resulted in the invalidation of the '474 patent.

B. IAS's Pre-Filing Investigation

In November of 2005, Johnson claims he became aware of a possible infringement of the '474 patent by the defendants herein when he saw and tested an IBM notebook computer with a fingerprint recognition system. After reviewing information about the product on the

IBM/Lenovo website, Johnson concluded that the system was covered by the '474 patent. Next, Johnson contacted his attorney, J. David Nelson, about the possibility of filing suit against IBM/Lenovo. Prior to commencing suit, in December of 2005, IAS also retained Craig J. Madson, another patent attorney, to perform an infringement analysis regarding the '474 patent, including claim construction analysis.

UPEK asserts that IAS's pre-filing investigation was lacking for two grounds. First, UPEK alleges that IAS's investigation was insufficient because it relied upon a frivolous interpretation of the term "camera means" as including both optical and non-optical fingerprint reading mechanisms. Second, UPEK alleges that IAS had knowledge of, but failed to properly study, prior art that virtually guaranteed that the relevant claims of the '474 patent would be invalidated.

1. The Construction of "Camera Means"

A critical aspect of Madson's pre-filing investigation was his assessment of the breadth of the term "camera means" as used in the first element of claim 1 of the '474 patent. A detailed assessment was necessary to determine whether the term also covered fingerprint systems, such as the one developed by UPEK and used by IBM/Lenovo, that do not employ camera-like optical readers. The UPEK system uses "Active Capacitive Sensing" technology which, unlike a camera, is not dependant upon the use of a light source, an aperture, a lens system, and light sensitive material. Rather than measuring light, the UPEK system measures the difference in the capacitance between two capacitor plates to map out the myriad ridges and valleys that comprise a fingerprint.

In the course of several meetings between Nelson and Madson during the two months leading up to IAS's filing of the lawsuit against IBM/Lenovo, Madson expressed his opinion that the "camera means" element of the '474 patent was "not limited to a camera, but includes any suitable replacement/reader." *Madson Decl.*, Dkt. 153, at 4. Madson supported this conclusion by referring to several statements appearing in the specifications section of the '474 patent that implied that the term "camera means" covered a broad array of reading devices. For example, Madson noted that the specifications stated that "the system can use any suitable reader that can render a valid picture of the fingerprint," '474 patent, col. 6, Ins. 20-22, that the system "takes the signal from the video camera . . . or suitable replacement, and converts the signal into digital format," *id.*, col. 9, 53-58, and implied that "any device that can convert an image to a picture form can be utilized" by the envisioned system, *id.*, col. 9, Ins. 21-24. Based upon this analysis, Madson advised Nelson that it was his belief that the IBM/Lenovo reader fell within the construction of the term "camera means."

By contrast, UPEK's expert witness, Dr. Behnam Bavarian, opined that those in the biometrics field would not consider UPEK's capacitive sensing technology as a camera, without exploring any possible difference between the terms "camera" and "camera means." *Bavarian Decl.*, Dkt. 121, at 2-5. Specifically, Dr. Bavarian noted that rather than generating a light-based photograph, UPEK's readers merely sense the "distance between the finger skin and the top surface of the sensor, e.g., the topography of the surface of the fingerprint."³ *Id.* Accordingly, he

³ UPEK asserts that IAS could have easily discovered the details of UPEK's system—which were readily available on UPEK's website—had IAS only conducted a Google search for "Lenovo fingerprint security" in May 2006. The relevant time period, however, was several months earlier, before the infringement lawsuits were filed. Further, from Madson's

believed UPEK's readers could not be considered "cameras."

The proper construction of the term "camera means" was also addressed in a *Markman* hearing heard by this Court on November 20, 2007. The defendants at that hearing argued that the term should be construed as requiring a "light sensitive device that receives a visual image and records the image on film or translates the image into electrical impulses." *Defendants' Claim Construction Brief*, Dkt. 51, at 36. IAS argued that the term was a "generic term referring to any suitable reader that can read a body part and generate an electronic representation of the body part." *Memorandum Opinion and Order*, Dkt. 79, January 2, 2008, at 7. This Court ultimately found that, although "camera means" is used broadly, it was not so broad as to include non-optical devices. *Id.* at 8.

2. The Prior Art References Revealed By IAS's Prosecution of Substantially Similar European and Japanese Patents

UPEK also claims that IAS proceeded to file several infringement lawsuits even though it had knowledge of prior art which virtually guaranteed all the relevant claims of the '474 would be invalidated. IAS learned of this prior art while prosecuting patents which were substantially similar to the '474 patent before the Japanese Patent Office (JPO) and the European Patent Office (EPO).

On March 8, 1996, IAS filed a patent application with the JPO. Subsequently, on September 7, 1999, the JPO issued an office action rejecting all the claims of the application as being unpatentable over several prior art references. The most important prior art reference relied

statements, it appears that even though IAS was not aware of UPEK's role as manufacturer of the IBM/Lenovo readers prior to the filing of the lawsuits, IAS was fully aware of their non-optical nature, and had considered the possible effect of this fact in its pre-filing investigation.

upon by the JPO was a Japanese Published Patent Application by inventor Brendan Costello. That application described a fingerprint identification apparatus substantially identical to U.S. Patent No. 4,947,443 ('443), also by Costello. In response to the JPO's initial rejection, Johnson submitted arguments on March 6, 2000 as to why his invention was patentable over the Costello prior art. In his response, Johnson states that his invention, unlike the Costello patent, does not merely compare "unchanged biological parts"; rather, it incorporates an enhancement function capable of taking the quality of the reading and the amount of moisture in the finger. *Miller Decl.*, Dkt. 122, Ex. 17.

On April 11, 2000, the JPO issued a final rejection of Johnson's Japanese application. Specifically, it rejected Johnson's argument regarding the Costello patent because the enhancement function was "not based on the description in the scope of patent claims, and it is not possible to adopt this." *Miller Decl.*, Dkt. 122, Ex. 18.

On March 8, 1996, Johnson also filed a patent application with the EPO. The EPO published the application on September 11, 1996 and subsequently issued a search report for the application, which it published on December 3, 1998. The EPO found several prior art references "particularly relevant" to the patentability of the Johnson application. *Miller Decl.*, Dkt. 122, Ex. 19. One of those "particularly relevant" prior art references was a PCT publication of an invention by Costello which was substantially identical to the '443 patent, *see Miller Decl.*, ex. 21. The EPO also found another European patent by Kazue Tanaka "particularly relevant" which was substantially identical to U.S. Patent No. 4,947,442 ('442).

The EPO issued an examination report on April 27, 2001 in which it rejected all of the

claims of the Johnson EPO application. *Miller Decl.*, Dkt. 122, Ex. 20. The EPO specifically found that claims 1 and 2 of the Johnson EPO application (which correspond to claims 1 and 2 of the '474 patent) were not patentable in light of the Costello and Tanaka prior art. Perhaps in light of his lack of success before the JPO, Johnson did not file a response to this EPO report and abandoned the application. Johnson, however, continued to view the '474 patent as valid due to his belief that both of the critical patents revealed during the Japanese and European prosecutions—the '442 and the '443 patents—were cumulative of the '086 patent which was disclosed in the '474 patent.

C. The Procedural History of this Case

IAS initially filed three separate cases with the Federal District for the District of Utah, each alleging infringement of the '474 patent. First, on January 24, 2006, IAS filed a case against Digital Persona alleging that the technology used in its peripheral fingerprint reading devices infringed on IAS's '474 patent. Approximately two weeks later, on February 7, 2006, IAS filed a second lawsuit against Microsoft Corp.,⁴ alleging that its fingerprint reading devices—which incorporated technology purportedly licensed to Microsoft by Digital Persona—also infringed on the '474 patent. That same day, IAS also filed a third lawsuit against IBM Corp. and Lenovo Inc.,⁵ alleging that the fingerprint readers integrated into their laptop computers infringed upon IAS's '474 patent.

⁴ *International Automated Systems, Inc. v. Microsoft Corp.*, No. 2:06-cv-00114 TC (C.D. Utah).

⁵ *International Automated Systems, Inc. v. IBM, IBM Corporation; IBM Personal Computing Division; Lenovo (United States), Inc.; Lenovo Group Ltd.; Upek, Inc. and John Does 1-20*, No. 2:06-cv-00115 BSJ (C.D. Utah).

Not long after the IBM action was filed, IBM and Lenovo made a formal indemnification demand on UPEK, the manufacturer of the allegedly infringing fingerprint readers. In response, on March 28, 2006, UPEK filed a lawsuit in the Northern District of California against IAS seeking a declaratory judgment that the '474 patent was not infringed and was invalid.⁶ After UPEK served its complaint on IAS, IAS amended its Complaint in the IBM action in the District of Utah to add UPEK as a defendant. UPEK, IBM, and Lenovo each also submitted motions to stay, dismiss, or transfer IAS's Utah suit to the Northern District of California.

In response, on June 23, 2006, IAS also moved to dismiss, or in the alternative, to stay or transfer UPEK's California declaratory judgment action to the District of Utah. On July 26, 2006, Judge Breyer granted IAS's motion and transferred the UPEK lawsuit to the District of Utah. Later, upon UPEK's motion, this Court consolidated UPEK's transferred declaratory judgment action into the IBM action pending before Judge Jenkins. In the meantime, on August 31, 2006, the Microsoft action was also consolidated with the Digital Persona action by stipulation of the parties.

None of the parties to the two remaining lawsuits, however, subsequently moved to further consolidate them. Presumably, the specific products at issue in each case—peripheral fingerprint readers in the Digital Persona/Microsoft case and integrated laptop fingerprint readers in the UPEK/IBM/Lenovo case—were sufficiently different to preclude ready consolidation.⁷

⁶ *UPEK v. International Automated Systems, Inc.*, No. 3:06-cv-02237-CRB (N.D. Cal.).

⁷ In its arguments before the California court, IAS acknowledged that all three of the cases it brought involving the '474 patent were related, and stated its intent "to coordinate all three cases before a single judge in that district after all defendants have appeared." IAS Motion to Dismiss, at 2. This initial desire to coordinate all three cases seems to have waned as the

UPEK itself acknowledged the difficulty of further consolidating the two remaining lawsuits in the briefs it submitted to both the Northern District of California and the District of Utah while the dueling motions to dismiss, stay, or transfer were both pending in those courts.⁸

Judge Jenkins set a schedule in the consolidated UPEK action which, after subsequent stipulated amendment, called for all discovery to be completed by February 13, 2008. Before engaging in substantial discovery, UPEK informed IAS of its belief that the suit was baseless, and offered to bear its own costs if IAS immediately moved to dismiss the case with prejudice. Letter from Jeffrey A. Miller to Darryl Woo, Aug. 15, 2007, *Miller Decl.*, Dkt. 150, Ex. 2. UPEK also informed IAS of its intention to seek its attorneys' fees and costs if IAS did not dismiss the case. *Id.* Despite several attempts, the parties were unable to reach a settlement.

On November 20, 2007, while the consolidated UPEK action was heading towards trial, this Court conducted a claim construction hearing and entertained the defendants' summary judgment motion in the consolidated Digital Persona lawsuit. On January 3, 2008, this Court entered summary judgment for Digital Persona and Microsoft and issued an order invalidating all the claims of the '474 patent for failing to satisfy various requirements of 35 U.S.C. § 112.

litigation took shape.

⁸ Before the California Court, UPEK argued that "the products made by Digital Persona and incorporated into Microsoft's products dramatically differ from the products made by UPEK and incorporated into Lenovo's PCs. *UPEK Opp. to Defendant's Motion to Dismiss, Stay or Transfer*, at 10. Subsequently, before the Utah Court, UPEK similarly argued that "the products sold by Digital Persona and Microsoft are dramatically different than those sold by UPEK and built into Lenovo's PCs. Infringement proofs will be different and maintaining the three actions in a single proceeding would only have invited confusion." *Memorandum in Support of Defendant UPEK's Motion to Stay, or in the Alternative, Dismiss, or Sever UPEK and Transfer Venue or Stay Litigation Involving Lenovo and IBM*, at 6, Dkt. 17, Case No. 2:06-cv-00115.

Subsequently, on January 9, 2008, Judge Jenkins sua sponte issued an order consolidating the consolidated UPEK action into the consolidated Digital Persona action.⁹

Shortly thereafter, IAS appealed this Court's invalidation of the '474 patent to the Court of Appeals for the Federal Circuit. On April 8, 2008, the Federal Circuit dismissed IAS's appeal because final judgment had not yet been entered on any of the noninfringement counterclaims or any of the claims or counterclaims in the suits between IAS and UPEK, IBM, and Lenovo.

International Automated Systems, Inc. v. Digital Persona, Inc., 2:06-cv-72, at 2 (Apr. 8, 2008).

Thereafter, both Digital Persona and Microsoft stipulated with IAS to dismiss all claims between the parties.

On June 2, 2008, IAS offered to also settle and dismiss its case against UPEK with no payment by UPEK. Three weeks later, UPEK instead opted to file the present motion for summary judgment and motion for attorney's fees. In response, on August 7, 2008, IAS granted UPEK a covenant not to sue and filed the present motion to dismiss for lack of subject matter jurisdiction. Finally, on September 15, 2008, UPEK filed two additional motions to strike declarations submitted by IAS during the course of briefing the summary judgment and attorney's fees motions.

⁹ Judge Jenkins noted that the '474 patent had been the subject of "at least four lawsuits filed in [the Federal District Court for the District of Utah]," and that the Plaintiffs failed to indicate any pending related cases on the Cover Sheet. *Order*, January 9, 2008, Dkt. 80, at 1 (noting that "[f]or whatever reason, cases with a common prior legal question were not brought to the attention of the court so that common questions could be dealt with by one decision-maker").

III. DISCUSSION

A. Jurisdiction of the District Court to Hear UPEK's Counterclaim

UPEK seeks summary judgment on its counterclaim that the '474 patent is unenforceable due to Neldon Johnson's inequitable conduct. This Court may only entertain UPEK's declaratory judgment counterclaim if there is an "actual controversy" between "interested" parties. 28 U.S.C. § 2201(a); *Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal., Inc.*, 248 F.3d 1333, 1340 (Fed. Cir. 2001). Recently, the Supreme Court decided *MedImmune, Inc. v. Genentech, Inc.*, in which the Court rejected the Federal Circuit's "reasonable apprehension of imminent suit" test for determining declaratory judgment jurisdiction. 549 U.S. 118, 132 n.11 (2007). Instead, the *MedImmune* court held that the key question in determining jurisdiction is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). In *SanDisk Corp. v. STMicroelectronics NV*, 480 F.3d 1372 (Fed. Cir. 2007), the Federal Circuit applied *MedImmune* in the context of suits to determine patent rights. The Federal Circuit held that,

where a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and where that party contends that it has the right to engage in the accused activity without license, an Article III case or controversy will arise and the party need not risk a suit for infringement by engaging in the identified activity before seeking a declaration of its legal rights.

Id. at 1381.

The burden of proving that a substantial and immediate controversy exists rests squarely

on the declaratory judgment plaintiff. *Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1345 (Fed. Cir. 2007). Specifically, the party seeking declaratory relief must “establish that such jurisdiction existed at the time the claim for declaratory relief was filed and that it has continued since. *Id.* (citing *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974) (“The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint [was] filed.”)).

In *Benitec*, the Federal Circuit reaffirmed that a patentee’s grant of a covenant not to sue divests a court of jurisdiction over a declaratory judgment plaintiff’s claims. 495 F.3d at 1346. *Benitec* in essence reaffirmed several pre-*MedImmune* decisions—decided under the “reasonable apprehension of imminent suit” test—which had all reached the same result. *See, e.g., Intellectual Property Development, Inc. v. TEI Cablevision of California, Inc.*, 248 F.3d 1333 (Fed. Cir. 2001); *Super Sack Manufacturing Corp v. Chase Packaging Corp.*, 57 F.3d 1054 (Fed. Cir. 1995); *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F.3d 852, 855 (Fed. Cir. 1999).

Certain procedural postures, however, require a court to retain jurisdiction over a declaratory judgment plaintiff’s claim even if at first blush it may appear that the precedent suggests otherwise. For example, in *Fort James Corp. v. Solo Cup Co.*, the Federal Circuit reversed the district court’s holding that it did not have jurisdiction to hear a declaratory judgment counterclaim of patent invalidity. 412 F.3d 1340, 1349 (Fed. Cir. 2005). In *Fort James*, the patentee granted Solo Cup, the alleged infringer, a covenant not to sue *after* a jury had returned a verdict finding that the patent at issue “was not invalid and that Solo Cup did not infringe any of the patents in suit.” *Id.* at 1345. Given this “unique procedural posture,” the

Federal Circuit concluded that a literal application of *Super Sack* was not appropriate. *Id.* at 1348. Rather, the *Fort James* court applied the now outmoded reasonable apprehension of suit test to distinguish *Super Sack*, *Intellectual Prop. Dev.*, and *Amana Refrigeration, Inc.* *Id.*

The court stated that the covenant granted by Fort James had no effect on Solo Cup's reasonable apprehension of liability because, by the time the covenant was granted, Fort James's claim for infringement had already been resolved by the jury. *Id.* Fort James effectively lost its ability to divest the district court of jurisdiction by waiting until after the decision on its infringement claims had been reached. The *Fort James* court further noted that this result is supported by Supreme Court cases allowing jurisdiction over declaratory judgments of invalidity after findings of noninfringement had already been entered. *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993) ("It is equally clear that the Federal Circuit, even after affirming the finding of non-infringement, had jurisdiction to consider Morton's appeal from the declaratory judgment of invalidity."); *Altwater v. Freeman*, 319 U.S. 359, 364 (1943).

In *Benitec*, the Federal Circuit offered its first post-*MedImmune* reading of *Fort James*. The *Benitec* court sided with *Super Sack* and its progeny and refused to uphold jurisdiction, focusing on the fact that *Benitec* requested dismissal "before a trial [of the infringement issue] and the considerable effort connected therewith had taken place." 495 F.3d 1340, 1347 (Fed. Cir. 2007). Rather, *Benitec* sought to dismiss its infringement claim after the Supreme Court issued an opinion in *Merck KgaA v. Integra Lifescience I, Ltd.*, 545 U.S. 193 (2005), which undermined the viability of *Benitec*'s infringement claims. *See Benitec*, 495 F.3d at 1347-48 ("Benitec made its covenant and sought dismissal of its infringement claim after it concluded that the *Merck*

decision precluded an infringement claim.”).

In sum, both *Benitec* and *Fort James* involved plaintiffs subsequently precluded from pursuing their original infringement claims. In *Fort James*, continuing jurisdiction was deemed proper because the infringement claims had been fully litigated and decided by the time the plaintiffs decided to grant the defendants a covenant not to sue. By contrast, in *Benitec*, though the plaintiffs were perhaps similarly foreclosed from succeeding on their infringement claims by the *Merck* decision, continuing jurisdiction was deemed lacking because no trial of Benitec’s infringement claims had taken place.

In the present case, UPEK understandably seeks to fit itself within the narrow *Fort James* exception. Unlike *Fort James*, however, the substance of IAS’s infringement claims have not yet been resolved on the merits. The parties never completed fact discovery, only conducted five fact depositions, and never reached the expert discovery stage. Furthermore, neither party has filed for summary judgment on the merits of IAS’s infringement claims, and no trial has been held.

This court’s invalidation of the ‘474 patent on January 3, 2008 in the Digital Persona case cannot serve as a proxy for a resolution of IAS’s infringement claims against UPEK. As UPEK itself noted, the infringement claims IAS brought against UPEK and IBM/Lenovo regarding fingerprint readers integrated into laptops are distinct from the claims IAS brought against Digital Persona. UPEK explicitly argued before Judge Jenkins that “the products sold by Digital Persona and Microsoft are dramatically different than those sold by UPEK and built into Lenovo’s PCs,” that the infringement proofs would be different in each case, and that intertwining them would “invite[] confusion.” Memorandum in Support of Defendant UPEK’s

Motion to Stay, or in the Alternative, Dismiss, or Sever Upek and Transfer Venue or Stay Litigation Involving Lenovo and IBM, at 6. The fact that Judge Jenkins consolidated the UPEK action into the Digital Persona action six days after this Court invalidated the ‘474 patent did not render IAS’s infringement claim against UPEK fully litigated and decided.

Further, this Court’s January 3 Order did not even address IAS’s infringement claims in the consolidated Digital Persona lawsuit. Rather, the January 3 Order construed the claims of the ‘474 patent and granted a motion for summary judgment brought by Digital Persona under 35 U.S.C. § 112. The effect of this order was to render any claims for infringement of the ‘474 patent moot. The effect was certainly not to render such claims fully litigated and decided such that UPEK might take advantage of the limited exception enunciated in *Fort James*.

As a result, this Court no longer has jurisdiction over UPEK’s claims under 35 U.S.C. § 285 that the ‘474 patent is unenforceable due to Johnson’s inequitable conduct. Accordingly, IAS’s Motion to Dismiss for Lack of Jurisdiction is GRANTED and UPEK’s Motion for Summary Judgment for Unenforceability under 35 U.S.C. § 285 is MOOT.

B. UPEK’s Motions to Strike Craig J. Madson’s Declaration and Affidavit

UPEK filed two motions to strike statements made by Craig J. Madson, one of which was made in opposition to UPEK’s motion for attorney’s fees and one of which was made in opposition to UPEK’s motion for summary judgment under 35 U.S.C. § 285. Even though this Court has already denied UPEK’s motion for summary judgment on jurisdictional grounds, it is still necessary to decide both motions because evidence of inequitable conduct is relevant to

UPEK's motion for attorney's fees.¹⁰

UPEK's first motion to strike turns on the question of whether IAS's non-disclosure of Madson's role in performing IAS's pre-filing investigation was justified under the attorney-client privilege or work-product doctrines. The motion is directed at the statements made by Madson in support of IAS's opposition to UPEK's motion for attorney's fees and costs. *Madson Decl. I*, Dkt. 153. In his first declaration, Madson states that he was retained in December 2005 as a consulting expert to perform an infringement analysis regarding the '474 patent. It further states that Madson met several times with IAS's attorneys to discuss whether the term "camera means" covered non-optical fingerprint readers. Madson concluded that "a reasonable construction of 'camera means' included both optical and non-optical readers." *Id.*

UPEK seeks to strike Madson's first declaration on the grounds that IAS's failed to identify Madson's role in IAS's pre-filing investigation. Specifically, IAS failed to mention Madson in their initial disclosures and interrogatory responses, and failed to produce any documents during discovery related to Madson's pre-filing investigation. Interrogatory No. 10 asked IAS to,

Identify each pre-lawsuit investigation conducted by or on behalf of [IAS] prior to the commencement of this lawsuit to investigate UPEK's, IBM's and/or Lenovo's alleged infringement of [the '474 patent], including the identity of each claim in the ['474 patent] evaluated for infringement prior to commencement of this lawsuit, each product that was compared with that claim prior to commencement

¹⁰ See *Monsanto Co. v. Bayer Bioscience N.V.*, 514 F.3d 1229, 1242 (Fed. Cir. 2008) ("While the covenant [not to sue for infringement] may have eliminated the case or controversy pled in the patent-related counterclaims and deprived the district court of Article III jurisdiction with respect to those counterclaims, the covenant does not deprive the district court of jurisdiction to determine the disposition of . . . the request for attorney fees under 35 U.S.C. § 285." (citing *Highway Equip. Co. v. FECO, Ltd.*, 469 F.3d 1027, 1033 n.1 (Fed. Cir. 2006))).

of this lawsuit, whether it was determined that the product infringed that claim prior to the commencement of this action, and where, when, how and by whom the pre-suit investigation was conducted and the infringement determination made, and all facts, documents, things and knowledgeable persons that supported that infringement determination that were known to [IAS] or their counsel prior to the commencement of this action.

Barrett Decl., Dkt. 172, Ex. C.

In response, IAS made its boilerplate objection based upon the attorney-client privilege and the work product doctrine, incorporated its response to Interrogatories Nos. 6 and 7, and reiterated that “[a]ny further information is protected by the attorney-client privilege and/or attorney work product doctrine.” *Barrett Decl.*, Dkt. 172, Ex. C. Interrogatory No. 6 asked how and on what date IAS first became aware of the infringing products, to which IAS answered,

IAS first became aware of UPEK when UPEK served its complaint for declaratory judgment on IAS in approximately late March, 2006. IAS first became aware that IBM and/or Lenovo were distributing products containing fingerprint authentication systems in approximately November, 2005. Neldon Johnson . . . saw an IBM notebook computer with a built-in fingerprint recognition system. Randy Johnson then searched the Internet and located the IBM/Lenovo website where information regarding the IBM/Lenovo notebook computers was advertised and where further information regarding the security feature using the built-in fingerprint recognition system was presented.

Barrett Decl., Dkt. 172, Ex. C.

Interrogatory No. 7 asked IAS to identify “any person who has conducted any inspection, testing, evaluation or analysis of any UPEK product or process” and to provide the “date, nature and results of such activity.” IAS responded as follows:

In approximately November of 2005, Neldon Johnson saw an IBM notebook computer with a built-in fingerprint recognition system and reviewed information on IBM/Lenovo’s website regarding the fingerprint recognition system utilized by IBM/Lenovo. He concluded that the system was covered by the patent-in-suit. It appeared to Neldon Johnson that the IBM/Lenovo fingerprint recognition system,

like the patented system he invented, utilized certain fingerprint features or characteristics for matching and not a gross fingerprint image. He concluded that the IBM/Lenovo Notebook computers with the built-in fingerprint recognition system appeared to contain all of the elements of Claim 1 of the patent-in-suit and therefore concluded that the IBM/Lenovo computers with the built-in fingerprint recognition system infringed the patent-in-suit.

Barrett Decl., Dkt. 172, Ex. C.

Given these facts, neither the attorney-client or the work-product privilege excuses IAS's non-disclosure of the fact that attorneys Madson and Nelson performed its pre-filing investigation. Especially given the history that had developed between UPEK and IAS which included a letter sent by UPEK to IAS after this lawsuit was filed informing IAS that UPEK considered the case to be improperly brought and that UPEK intended to seek its attorneys' fees, IAS was clearly on notice that the adequacy of a pre-filing investigation may be at issue. The discovery discussed above clearly inquired into such pre-filing issues. IAS should have at least disclosed the fact that attorneys were consulted, rather than simply refer to the investigation performed by Johnson and his son Randy. This becomes all the more clear in light of the haste with which IAS produced Madson's declaration for precisely that purpose (to prove that it had in fact conducted an adequate pre-filing investigation) when facing UPEK's motion for attorney's fees.

Under these circumstances, IAS was obligated under Rule 26(a) of the Federal Rules of Civil Procedure to disclose its consultations with Madson and Nelson before it filed suit against UPEK.

Even though IAS was obligated to disclose the fact that an attorney played a significant role in its pre-filing investigation pursuant to Rule 26(e) of the Federal Rules of Civil Procedure,

it might still escape the harsh sanction of exclusion set out in Rule 37 of the Federal Rules of Civil Procedure if its non-disclosure was either substantially justified or harmless. Fed. R. Civ. P. 37. Rule 37, however, also states that “in addition or instead of [exclusion], the court, on motion and after giving an opportunity to be heard: (A) may order payment of the reasonable expenses, including attorney’s fees, caused by the failure.” *Id.*

As discussed above, IAS’s non-disclosure of Nelson and Madson’s role in the pre-filing investigation was not justified under either the attorney-client privilege or the work-product doctrine. However, IAS’s non-disclosure may nevertheless be harmless. The following factors serve to guide the district court in determining harmlessness: “(1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party’s bad faith or willfulness.” *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 954 (10th Cir. 2002) (quoting *Woodworker’s Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999)).

After weighing the four factors, this Court finds that the non-disclosure was not harmless. With respect to the first factor, a simple glance at the chronology of the present case clearly demonstrates that IAS’s non-disclosure both prejudiced and surprised UPEK. Prior to filing its motion for attorney fees and costs, UPEK relied upon IAS’s interrogatory responses in determining the scope of IAS’s pre-filing investigation, information that lies at the very heart of its motion for attorney fees under 35 U.S.C. § 285. As regards the second factor, there was nothing practical UPEK could have done prior to filing its motion for attorney fees to cure the

prejudice. Indeed, had IAS disclosed the fact that attorneys played a substantial role in IAS's pre-filing investigation, UPEK may well have decided not to file a motion for attorney fees in the first place. The third factor is not applicable, as no trial on IAS's motion for attorney fees is set to take place. Finally, the fourth factor is not dispositive because, even if we assume IAS acted in good faith, good faith alone does not cure the prejudicial effect on UPEK of the non-disclosure. *See Jacobsen*, 287 F.3d at 954.

Having determined that IAS should have disclosed the Madson and Nelson information earlier, and finding that failure to do so was neither justified nor harmless, we turn to Rule 37 for an appropriate sanction. The Rule first allows the Court to prohibit any use of the untimely disclosed information. This is what UPEK requests in its motion to strike. Rule 37 also allows the Court to consider allowing the information to be used by the offending party while requiring the offender to pay "reasonable expenses, including attorney's fees, caused by the failure." Fed. R. Civ. Pro. 37(c)(1). The Court finds the latter sanction appropriate in this case. Accordingly, UPEK's motion to strike is DENIED. IAS is allowed to use the Madson declaration in support of the adequacy of its pre-filing investigation, but IAS is required to pay UPEK for its reasonable costs and attorney's fees in connection with UPEK's filing of its motion for attorney's fees and its motion to strike Madson's first declaration.

UPEK's second motion to strike requires an assessment of whether Madson can properly be considered an expert for the purpose of determining whether the '570 patent is cumulative to the '086 patent. *Madson Decl. II*, Dkt. 159. UPEK claims that Madson does not meet the requirements of Fed. R. Evid. 702. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. To qualify as an expert, a person must possess “such skill, experience or knowledge in that particular field as to make it appear that his opinion would rest on substantial foundation and would tend to aid the trier of fact in his search for truth.” *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 928 (10th Cir. 2004) (quoting *Graham v. Wyeth Labs.*, 906 F.2d 1399, 1408 (10th Cir. 1990)).

Expert testimony on issues of law, however, is generally inadmissible. *See Estate of Sowell v. United States*, 198 F.3d 169, 171-72 (5th Cir. 1999); *United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993); *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993); *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991); *United States v. Jungles*, 903 F.2d 468, 477 (7th Cir. 1990). Indeed, “[a]n expert’s opinion on the ultimate legal conclusion is neither required nor indeed ‘evidence’ at all.” *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1574 (Fed. Cir. 1993) (quoting *Nutrition 21 v. United States*, 930 F.2d 867, 871 n.2 (Fed. Cir. 1991)).

In *Markman v. Westview*, the Federal Circuit expressly held that claim construction is a matter of law. 52 F.3d 967, 979 (Fed. Cir. 1995). In *Markman*, the court found that the testimony of a “patent attorney on the proper construction of the claims is entitled to no deference.” *Id.* at 983. Subsequently, the Federal Circuit noted that it has “on numerous occasions noted the impropriety of patent lawyers testifying as expert witnesses and giving their opinion regarding the proper interpretation of a claim as a matter of law.” *Endress + Hauser, Inc. v. Hawk*

Measurement Systems Pty. Ltd., 122 F.3d 1040, 1042 (Fed. Cir. 1997). The question of whether a particular patent is cumulative to another must similarly be an issue of law, as it requires the claims of two patents to be construed and compared. *See e.g., Applied Materials, Inc. v. Advanced Semiconductor Materials America, Inc.*, 1995 WL 261407, at *7 (N.D.Cal. April 25, 2005) (preventing a patent attorney from testifying as to what the prior art teaches because he was not a technical expert).

UPEK's second motion to strike concerns the statements made by Madson in support of IAS's opposition to UPEK's motion for summary judgment. *Madson Decl. II*, Dkt. 159. Madson's second declaration addresses the materiality of the '570 patent to Johnson's '014 application. It concludes that the '570 patent is cumulative to the '086 patent which was disclosed to the PTO by Johnson in his '014 application. Madson's opinion, however, is itself cumulative of other parts of the record that contain the same arguments regarding the teachings of the '570 and '086 patents, and the differences between systems based upon Cartesian coordinates and those based upon relative location.

In its second motion to strike, UPEK argues that Madson's bachelor's degree in mathematics does not qualify him as an expert regarding the differences between the '570 and '086 patent. Indeed, there is no evidence that Madson has any specialized knowledge in biometrics, that he studied biometrics, took any graduate level courses, or ever worked in the biometrics industry. Madson's declaration does not rest on a substantial foundation and is therefore unhelpful to this Court. Accordingly, UPEK's motion to strike Madson's declaration in opposition to UPEK's motion for summary judgment under 35 U.S.C. § 285 is GRANTED.

However, because the legal arguments contained in Madson's second declaration were already before the Court, striking his second declaration has little effect on the outcome of UPEK's motion for attorney's fees.

C. UPEK's Motion for Attorney Fees

Title 35 U.S.C. § 285 provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." IAS's covenant not to sue UPEK does not deprive this Court of jurisdiction to determine attorney fees under 35 U.S.C. § 285. *See Monsanto Co. v. Bayer Bioscience N.V.*, 514 F.3d 1229, 1242 (Fed. Cir. 2008) ("While the covenant [not to sue for infringement] may have eliminated the case or controversy pled in the patent-related counterclaims and deprived the district court of Article III jurisdiction with respect to those counterclaims, the covenant does not deprive the district court of jurisdiction to determine the disposition of . . . the request for attorney fees under 35 U.S.C. § 285." (citing *Highway Equip. Co. v. FECO, Ltd.*, 469 F.3d 1027, 1033 n.1 (Fed. Cir. 2006))).

"A case may be deemed exceptional when there has been some material inappropriate conduct related to the matter in litigation, such as willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates Fed. R. Civ. R. 11, or like infractions." *Brooks Furniture Mfg., Inc. v. Dutailier Intern., Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005).¹¹ Additionally, the Court may

¹¹ Thus, although the Court no longer has jurisdiction over UPEK's motion for summary judgment based upon inequitable conduct, it still must consider inequitable conduct in determining UPEK's motion for attorney fees under 35 U.S.C. § 285. *See, e.g., Monsanto*, 514 at 1242 (Fed. Cir. 2008) ("[T]he district court's jurisdiction to rule on attorney fees encompassed the jurisdiction to make findings of inequitable conduct regarding all four patents."); *Enzo Biochem, Inc. v. Calgene, Inc.*, 188 F.3d 1362, 1380 (Fed. Cir. 1999) (holding that the district

consider “the closeness of the case, the tactics of counsel, the conduct of the parties, and any other factors that may contribute to a fair allocation of the burden of litigation as between winner and loser.” *S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198, 201 (Fed. Cir. 1986). Despite this list of triggering factors, the Federal Circuit has cautioned that “it is not contemplated that the recovery of attorney’s fees will become an ordinary thing in patent suits.” *Forest Labs., Inc. v. Abbott Labs.*, 339 F.3d 1324, 1329 (Fed. Cir. 2003). Rather, “[i]n the context of fee awards to prevailing accused infringers, . . . § 285 is limited to circumstances in which it is necessary to prevent ‘a gross injustice’ to the accused infringer.” *Id.* (quoting *Mach. Corp. of Am. v. Gullfiber AB*, 774 F.2d 467, 472 (Fed. Cir. 1985)). Accordingly, the burden is on the party seeking attorney fees to prove an exceptional case by clear and convincing evidence. *Forest Labs., Inc. v. Abbott Labs.*, 339 F.3d 1324, 1327 (Fed. Cir. 2003).

In the present case, UPEK relies heavily upon the inadequacy of IAS’s pre-filing investigation in making its motion for attorney’s fees under § 285. It is therefore necessary to examine more closely the differences between the Rule 11 and § 285 standards for pre-filing investigations. As noted above, a case may be deemed exceptional because the plaintiff was unjustified in bringing it, violated Rule 11, or committed other similar infractions. As a result, the adequacy of the plaintiff’s pre-filing preparation is certainly “relevant to the ‘exceptional’ case question.” *Epcon Gas Systems, Inc. v. Bauer Compressors, Inc.*, 279 F.3d 1022, 1035 (Fed. Cir. 2002).

court “erred in not making an inequitable conduct determination prior to ruling on the exceptional case issue”); *A.B. Chance Co. v. RTE Corp.*, 854 F.2d 1307, 1312 (Fed. Cir. 1988) (“[T]he district court erred when it did not make a determination of whether or not Chance had engaged in inequitable conduct before the PTO [in denying the request for attorney fees].”).

Merely showing that a “non-ideal” pre-filing investigation was performed, however, is not enough to justify an award of under § 285; rather, the conduct must rise “to the level of bad faith litigation or gross negligence.” *Q-Pharma, Inc. v. Andrew Jergens Corp.*, 360 F.3d 1295, 1298 (Fed. Cir. 2004) (affirming the district court’s finding of non-exceptionality). Section 285 motions based upon the inadequacy of a pre-filing investigation are therefore critically different from Rule 11 motions based upon the same underlying conduct. Rule 11 only requires “an inquiry reasonable under the circumstances,” Fed. R. Civ. P. 11(b); Section 285, on the other hand, requires clear and convincing evidence of “studied ignorance.” *Eltech Systems Corp. v. PPG Industries, Inc.*, 903 F.2d 805, 810 (Fed. Cir. 1990); *see also Digeo, Inc. v. Audible, Inc.*, 505 F.3d 1362, 1369 (Fed. Cir. 2007) (highlighting the differences between Rule 11 and § 285 and noting that “merely negligent conduct does not suffice to establish that a case is exceptional”); *Ultra-Temp Corp. v. Advanced Vacuum Systems, Inc.*, 189 F.R.D. 17, 21 (D. Mass. 1999) (“[U]nlike Rule 11, a failure to conduct an adequate investigation, without more, is not grounds for finding a case to be ‘exceptional’ under 35 U.S.C. § 285”).

A heightened standard is appropriate for § 285. Unlike Rule 11, the party requesting fees under § 285 need not provide its opponent any advance written notice that it will seek fees or an opportunity to withdraw the challenged pleading. Fed. R. Civ. P. 11(c)(2). Further, unlike a Rule 11 case, the burden remains with the movant even after a non-frivolous allegation has been made. *Digeo, Inc. v. Audible, Inc.*, 505 F.3d 1362, 1368 (Fed. Cir. 2007). Accordingly, parties who run afoul of specific pre-filing investigation requirements set out in Rule 11 cases¹² do not

¹² For cases involving pre-filing requirements under Rule 11, see, for example, *Intamin, Ltd. v. Magnetar Tech., Corp.*, 483 F.3d 1328, 1338 (Fed. Cir. 2007); *Hoffmann-La Roche Inc. v.*

necessarily simultaneously rule afoul of § 285. In *Digeo*, the Federal Circuit made clear that to benefit from the more lenient Rule 11 standard, a party must bring a successful Rule 11 motion prior to moving for attorney's fees under § 285. *Id.* at 1367.

Several of the exceptional case factors are arguably present in this case. First, UPEK alleges that IAS's non-disclosure of the '570 patent amounts to inequitable conduct before the PTO. Second, UPEK alleges that IAS was unjustified in bringing this lawsuit in light of its prior failure to obtain patents from the Japanese and European patent offices. Finally, UPEK alleges that IAS's pre-filing investigation was wholly inadequate because IAS failed to reasonably research UPEK's products, because IAS's attorneys were not sufficiently involved in the investigation, and because Madson failed to reasonably construe the term "camera means."

Regarding the allegation of inequitable conduct, this Court finds that IAS's actions in not disclosing the '570 patent do not amount to clear and convincing evidence proving an exceptional case. IAS failed to disclose a patent that disclosed a "unique number"-type procedure very similar to the procedure claimed in the '474 patent. The inequitable nature of that non-disclosure, however, hinges on the closer questions of whether the '570 patent is cumulative of the '086 patent which Johnson did disclose to the PTO, and, to the extent that it is not, whether any remaining differences between the '570 and the '086 would have been material to the PTO in evaluating Johnson's many patent applications and amendments. The closeness of these questions prevents this evidence of inequitable conduct from elevating the present case's

Invamed Inc., 213 F.3d 1359, 1364 (Fed. Cir. 2000); *Judin v. United States*, 110 F.3d 780, 784-85 (Fed. Cir. 1997); *Cambridge Prods., Ltd. v. Penn Nutrients, Inc.*, 962 F.2d 1048, 1050 (Fed. Cir. 1992).

status to exceptional under 35 U.S.C. § 285.

Evidence of IAS's failed Japanese and European patent applications is similarly insufficient to serve as clear and convincing evidence that this case is exceptional. The fact that the JPO rejected a patent application substantially similar to the '474 patent on the grounds that it was anticipated by another U.S. patent and that it failed to claim quality determination and enhancement certainly should have given IAS pause in bringing several of its lawsuits. This evidence alone, however, does not make IAS's filing frivolous or unjustified. Patents issued by the PTO enjoy a presumption of validity, *see* 35 U.S.C. § 282, and patentees need not submit any evidence as to the validity of their patents before initiating an infringement action, *see Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1562 (Fed. Cir. 1988). Thus, the Japanese and European patent offices' decisions did not foreclose IAS's right to sue for infringement of the '474 patent in the United States.

Finally, IAS's pre-filing investigation was not so insufficient as to meet the heightened standard under § 285. Several aspects of IAS's pre-filing investigation can certainly be considered "non-ideal": (1) the fact that Johnson and his son Randy appear to have substantially performed the investigation without the assistance of an attorney; (2) the fact that IAS's claim chart provided by Madson makes no mention of the quality determination and enhancement procedures that IAS seems to have thought were so critical to the '474 patent during its prosecution; and (3) the fact that IAS's and Madson's construction of the term "camera means" bordered on frivolous and was ultimately rejected by this Court. Even though these facts may possibly have supported a successful Rule 11 motion, they do not rise "to the level of bad faith

litigation or gross negligence” required to warrant “exceptional” status under § 285.

Accordingly, UPEK’s motion for attorney’s fees under § 285 is denied.

In sum, for the reasons stated above, IAS’s Motion to Dismiss for Lack of Jurisdiction is GRANTED; UPEK’s Motion for Summary Judgment for Unenforceability under 35 U.S.C. § 285 is MOOT; UPEK’s motion to strike Madson’s declaration in opposition to UPEK’s motion for attorney’s fees is DENIED; UPEK’s motion to strike Madson’s declaration in opposition to UPEK’s motion for summary judgment under 35 U.S.C. § 285 is GRANTED; and UPEK’s motion for attorney’s fees under § 285 is DENIED. Finally, although UPEK’s motion to strike Madson’s declaration in opposition to UPEK’s motion for attorney’s fees is DENIED; for the reasons stated above, IAS is required to pay UPEK for the reasonable costs and attorney’s fees UPEK incurred in connection with UPEK’s filing of it’s motion for attorney’s fees and its motion to strike Madson’s first declaration.

Dated this 12th day of January, 2009

A handwritten signature in black ink that reads "Dee Benson". The signature is written in a cursive, flowing style. The first name "Dee" is written with a large, stylized 'D' that loops around the 'e'. The last name "Benson" is written in a more standard cursive script.

Dee Benson
United States District Court

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID C. GERBER, TOBY J.
QUESINBERRY, JAMES R. MILLERBERG,
BRADLEY A. HASLETT

Defendant.

ORDER GRANTING STIPULATED
MOTION TO EXTEND MILLERBERG'S
DEADLINE TO FILE OBJECTIONS TO
PLAINTIFF'S DISCLOSURES

Civil No. 2:06cv-01044 TS

Judge: Ted Stewart

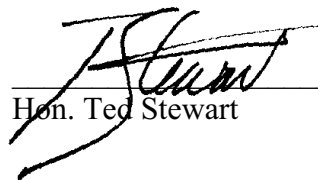
The court having reviewed the Stipulated Motion to Extend Millerberg's Deadline to File
Objections to Plaintiff's Disclosures, filed by counsel for James Millerberg,

IT IS HEREBY ORDERED that, pursuant to the stipulation of counsel for the Plaintiff,

The United States and counsel for James Millerberg (“Millerberg”), Millerberg’s deadline to file Objections to Plaintiff’s Disclosures is extended to January 13, 2009.

DATED this 12th day of January, 2009

BY THE COURT



Hon. Ted Stewart

1026283v1

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

CENTRAL DIVISION

District of

UTAH

UNITED STATES OF AMERICA

V.

RAUL ALONSO ZUNIGA-CASTILLO

JUDGMENT IN A CRIMINAL CASE

2009 JAN 12 A 8:17

DISTRICT OF UTAH

Case Number: DUTX207CB000130-001

USM Number: 07999-081

Ben Hamilton

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 5 and 8 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1)	Possession with Intent to Distribute Cocaine Base		5
18 U.S.C. § 924(c)	Possession of a Firearm in Furtherance of a Drug Trafficking		8
	Crime		

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 1-4, 6-7, and 9 of the Indictment ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/8/2009

Date of Imposition of Judgment

Signature of Judge

The Honorable Ted Stewart

U. S. District Judge

Name of Judge

Title of Judge

1/9/2009

Date

DEFENDANT: RAUL ALONSO ZUNIGA-CASTILLO
CASE NUMBER: DUTX207CR000130-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

136 months (121 for Count 5, and 15 for count 8 to run consecutively)

☒ The court makes the following recommendations to the Bureau of Prisons:

1. Incarceration in Englewood, CO
2. Participation in RDAP or other drug abuse treatment

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: RAUL ALONSO ZUNIGA-CASTILLO
CASE NUMBER: DUTX207CR000130-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

60 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: RAUL ALONSO ZUNIGA-CASTILLO
CASE NUMBER: DUTX207CR000130-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not illegally reenter the United States. If the defendant returns to the United States during the period of supervision, he/she is instructed to contact the United States Probation Office in the District of Utah within 72 hours of arrival in the United States.

DEFENDANT: RAUL ALONSO ZUNIGA-CASTILLO
 CASE NUMBER: DUTX207CR000130-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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--	--	--	--

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TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>	
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RAUL ALONSO ZUNIGA-CASTILLO
CASE NUMBER: DUTX207CR000130-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 200.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Blued.38 special revolver; and.38 caliber Smith and Wesson Model 67 revolver handgun, Serial No. 8K89494.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

UNITED STATES DISTRICT COURT
FILED
U.S. DISTRICT COURT

CENTRAL DIVISION

District of

UTAH

UNITED STATES OF AMERICA

V.

ARNULFO VENEGAS-HUERTA

JUDGMENT IN A CRIMINAL CASE

DISTRICT OF UTAH

Case Number: DUTX2079R000572-011

USM Number: 14894-081

Augustus Chin

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 19 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1)	Possession with Intent to Distribute a Schedule II Controlled Substance - cocaine		19

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 2 and 20 of the Indictment ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/6/2009

Date of Imposition of Judgment

Signature of Judge

The Honorable Ted Stewart

Name of Judge

U. S. District Judge

Title of Judge

1/9/2009

Date

DEFENDANT: ARNULFO VENEGAS-HUERTA
CASE NUMBER: DUTX207CR000572-011

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

33 months

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ARNULFO VENEGAS-HUERTA

CASE NUMBER: DUTX207CR000572-011

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ARNULFO VENEGAS-HUERTA
CASE NUMBER: DUTX207CR000572-011

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not re-enter the United States illegally. In the event that the defendant should be released from confinement without being deported, he shall contact the United States Probation Office in the district of release within 72 hours of release. If the defendant returns to the United States during the period of supervision after being deported, he is instructed to contact the United States Probation Office in the District of Utah within 72 hours of arrival in the United States.

DEFENDANT: ARNULFO VENEGAS-HUERTA
 CASE NUMBER: DUTX207CR000572-011

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 7,500.00	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$	<u>0.00</u>	\$	<u>0.00</u>
---------------	----	-------------	----	-------------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ARNULFO VENEGAS-HUERTA
CASE NUMBER: DUTX207CR000572-011

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
Fine of \$7500 payable at a rate determined by USPO/

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

FILED
U.S. DISTRICT COURT

RECEIVED

2009 JAN 12 A 10:00

DISTRICT OF UTAH

OFFICE OF

JUDGE TENA CAMPBELL

BY: _____
DEPUTY CLERK

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*Attorneys for Defendants Andrew Chiang, Jun Yang,
Lonny Bowers, WideBand Solutions, Inc. and Versatile DSP*

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

CLEARONE COMMUNICATIONS, INC., a
Utah Corporation

Plaintiff,

v.

ANDREW CHIANG, an individual,
JUN YANG, an individual,
LONNY BOWERS, an individual,
WIDEBAND SOLUTIONS, INC., a
Massachusetts corporation, VERSATILE
DSP, a Massachusetts corporation, and
BIAMP SYSTEMS CORPORATION, INC.,
an Oregon corporation.

Defendants.

**ORDER GRANTING EXTENSION OF
TIME TO RESPOND TO CLEARONE'S
MOTION FOR PERMANENT
INJUNCTION, EXEMPLARY DAMAGES,
AND ENTRY OF FINAL JUDGMENT
(DKT. NO 1302)**

Case No. 2:07-cv-0037 TC

(Consolidated with Civil No. 2:07-cv-832)

Honorable Tena Campbell
Magistrate Judge David Nuffer

Based upon the Stipulated Joint Motion for Extension of Time to Respond to ClearOne's Motion for Permanent Injunction, Exemplary Damages, and Entry of Final Judgment (Dkt. No 1302) submitted by Plaintiff ClearOne Communications, Inc. ("**ClearOne**"), Defendants Andrew Chiang, Jun Yang, Lonny Bowers, WideBand Solutions, Inc., and Versatile DSP (collectively "**WideBand Defendants**"), and Defendant Biamp Systems Corporation, Inc. ("**Biamp**"), and good cause appearing, it is hereby ordered that the WideBand Defendants and Biamp shall have an extension of time up to and including January 26, 2009, in which to file their respective memoranda in response to ClearOne's Motion for Permanent Injunction, Exemplary Damages, and Entry of Final Judgment (Dkt. No 1302).

DATED this 9th day of January, 2009.

BY THE COURT

Tena Campbell

TENA CAMPBELL, Chief
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

RICH FINANCIAL, LLC,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

**MEMORANDUM DECISION
AND ORDER**

Case No. 2:07CV403DAK

This matter is before the court on cross motions for summary judgment on the issue of the priority of the parties' rights in funds levied by the IRS. The court held a hearing on these motions on November 25, 2008. At the hearing, Plaintiff was represented by Craig Howe, and Defendant was represented by Rick Watson. The court took the motions under advisement. The court has carefully considered all pleadings, memoranda, and other materials submitted by the parties, the arguments made by counsel at the hearing, and the law and facts relevant to the motions. Now being fully advised, the court enters the following Memorandum Decision and Order.

BACKGROUND

Plaintiff Rich Financial is a third party creditor who loaned money to BCBU, or Rocky Mountain Home Care. Rich Financial is an entity controlled by Lamar and Jay Bangerter. Rocky Mountain is controlled by their cousin Dee Bangerter. On March 5, 1995, Rich Financial and Rocky Mountain signed a promissory note for \$2.1 million in favor of Rich Financial.

Pursuant to the promissory note, Rich Financial established a line of credit to Rocky Mountain ("Rocky Mountain account"). The promissory note was secured by a security agreement, which granted Rich Financial a lien in and to all of BCBU's accounts receivable, equipment, leasehold improvements, and the proceeds of each.

Paragraph 4 of the promissory note states that it is secured by "all Accounts Receivable of [Rocky Mountain] in addition to all leasehold improvements on [its] premises." The security agreement further defines collateral as "All of [Rocky Mountain]'s accounts receivable evidencing any right to payment for goods sold or leased or for services rendered." The security agreement also defines Rocky Mountain's payment obligations as "the sum evidenced by the above-mentioned note or any renewals or extensions thereof executed pursuant to this security agreement in accordance with the terms of such note and any other obligations that now exist or may hereafter accrue from [Rocky Mountain] to [Rich Financial]."

The line of credit agreement was periodically renewed between the two parties on essentially the same terms. None of these renewals changed the collateral or terms of the line of credit or the security agreement. Beginning on March 3, 1995, and continuing until at least April 9, 2007, Rich Financial regularly made advances to Rocky Mountain under this line of credit. The purpose of the line of credit and the advances was to fund the operations of Rocky Mountain. Rich Financial recorded the line of credit and security agreement with the Department of Commerce on July 9, 2002.

At various dates prior to and including December 31, 2002, Rich Financial also began including obligations other than those representing advances directly to Rocky Mountain in the Rocky Mountain account. On October 9, 1997, Rich Financial added an obligation of \$118,000

to the Rocky Mountain account representing a distribution or loan to the mother of Dee and Lee Bangerter, the individuals who controlled Rocky Mountain. Rich Financial provides no explanation for why Rocky Mountain would be responsible to Rich Financial for monies distributed to an individual rather than the company.

In addition, between May 1997 and August 1999, Rich Financial also established lines of credit with several other entities controlled by Dee and Lee Bangerter. These other entities included United Alternative Home Care, Nurse Network of Utah, Pro Med, Inc., United Home Health Care of Southern California, United Home Care dba CSM Home Health Care, and Premier Home Care Services. However, no documents related to these lines of credit were ever recorded with the Utah Department of Commerce, with the exception of documents relating to the line of credit with CSM Home Health Care.

Rich Financial made advances to these entities under the separate lines of credit. The advances were made for the separate entity, not Rocky Mountain. However, all of these additional lines of credit ultimately went into default. On February 15, 2000, the defaulted lines of credit between Rich Financial and United Alternative Home Care, Nurse Network of Utah, Pro Med, Inc., United Home Health Care of Southern California, and Premier Home Care Services were consolidated into the line of credit between Rich Financial and Rocky Mountain. On December 31, 2002, the line of credit between Rich and United Home Care dba CSM Home Health Care was consolidated into the line of credit between Rich Financial and Rocky Mountain. These consolidations were done to make payment of the separate obligations more convenient for Dee and Lee Bangerter.

On March 20, 2003, a representative of the Secretary of the Treasury recorded a Notice of

Federal Tax Lien (“NFTL”) concerning the tax liabilities of Rocky Mountain with the County Recorder in Davis County, Utah, the proper place to record such an instrument. Other NFTLs concerning the liabilities of Rocky Mountain were recorded in Salt Lake and Davis Counties at this time and subsequently. The total amount ultimately levied by the IRS pursuant to the NFTLS was \$1,306,227.00.

As of May 5, 2003, which is legally significant because it is 45 days after the NFTL was filed, the principal balance on Rocky Mountain’s line of credit for sums directly advanced to Rocky Mountain was \$423,959.40. The consolidated amount due and owing on May 5, 2003, however, was \$2,875,181.42.

The last advance to Rocky Mountain under the line of credit prior to May 5, 2003, was on July 22, 2002. But, beginning again on December 23, 2003, and continuing until at least April 9, 2007, Rich Financial continued to make other regular advances to Rocky Mountain. Also after May 5, 2003, Rocky Mountain made payments to Rich Financial totaling \$1,510,000. Neither Rich Financial, Rocky Mountain, nor the underlying documents made any designation as to how these payments were to be applied.

On December 13, 2002, Rocky Mountain and other entities controlled by Dee and Lee Bangerter, none of which include the entities who received a line of credit from Rich Financial and whose obligations were consolidated into Rocky Mountain's account, filed a lawsuit against the State of Utah. The lawsuit alleged breach of contract and breach of the implied covenant of good faith and fair dealing relating to the State’s Medicaid reimbursements to Rocky Mountain. The entities claimed that the State had established and paid rates to them that were below the reimbursement rates required by certain Medicaid policies, standards, and methods. Rocky

Mountain and the other entities sought damages of over \$16 million and injunctive relief.

On March 14, 2007, the parties to the action filed a stipulated motion for dismissal with prejudice. That motion indicated that the parties had "resolved the matter, without either party denying or admitting liability to the other, based on a payment from [the State] to Plaintiffs in the amount of \$7 million dollars and in exchange for mutual releases concerning the subject matter of the claims." On March 20, 2007, the court dismissed the suit based on the stipulation. On April 5, 2007, the IRS levied on the settlement funds Rocky Mountain was to receive from the State.

On June 19, 2007, Rich Financial filed this action against the United States asserting two causes of action: (1) wrongful levy pursuant to 26 U.S.C. § 7426; and (2) declaratory judgment pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201, and the Utah Declaratory Judgments Act, Utah Code Ann. § 78-33-1. On a previous motion to dismiss, this court dismissed Rich's second cause of action.

After this litigation began, on November 10, 2008, Rich re-recorded with the Utah Department of Commerce a new UCC-1 filing statement concerning the line of credit between Rich Financial and Rocky Mountain. The collateral obligation was now defined to include proceeds from the litigation against the Utah Department of Health, although the terms of the line of credit did not change.

DISCUSSION

The parties have filed cross motions for summary judgment asserting a priority of interest in the settlement funds levied by the IRS. Rich Financial claims that its security interest in the funds is superior to the IRS's NFTL and that the IRS wrongfully levied Rocky Mountain's

settlement funds. Conversely, the government argues that the NFTL is superior to Rich Financial's security interest and that Rich Financial does not have a security interest in the settlement funds that Rocky Mountain obtained from the State of Utah.

A. Priority of Interests

Lien priority questions involving a federal tax lien are decided by federal law under the principle of "the first in time is the first in right." *United States v. McDermott*, 507 U.S. 447, 449 (1993). Under 26 U.S.C. § 6321, once the IRS makes an assessment that tax is due from a taxpayer, a lien is created in favor of the United States without any particular filing requirement. *Id.* at 449. The "general rule is that the tax collector prevails even if he has not recorded at all." *Id.* at 454.

Section 6323 of the Internal Revenue Code, however, establishes that certain interests can be superior to a tax lien. Subsection (d) of Section 6323 provides for priority against a filed federal tax lien for security interests in property arising out of advances made within 45 days of the filing of the IRS's tax lien or until knowledge is obtained of the filing of the lien, if earlier. 26 U.S.C. § 6323; *see also Slodov v. United States*, 436 U.S. 238, 258 n.22 (1978) ("when a security agreement exists and filing has occurred prior to the filing of a tax lien to secure advances made after the tax filing, perfection is, at the least, achieved when the secured party makes the advance. When that occurs after the tax lien has been filed, section 6323(d) protects the secured party from the federal tax lien if the advance is made not later than 45 days after the filing of the tax lien or upon receipt of actual notice of the tax lien filing, whichever is sooner.").

It is undisputed in this case that the United States first filed an NFTL in Davis County, Rocky Mountain's place of business, on March 20, 2003. Under Section 6323(d), Rich had 45

days from that date, or until May 5, 2003, to make advances to Rocky Mountain under the line of credit in order to secure them against the United States's NFTL. All later extensions of credit, and interest and costs accrued thereon, are similarly secured, but remain in third-priority position behind the United States' tax lien. Therefore, the parties' dispute focuses on the amount Rocky Mountain was obligated to pay Rich Financial as of May 5, 2003.

The government does not dispute that Rich Financial properly perfected its security interest on July 9, 2002. Also, the government does not dispute both that the Medicaid payments at issue constitute "accounts receivable" and that the accounts receivable arose when Rocky Mountain performed the Medicaid services, which was before the recording of the first NFTL. Rather, in its motion, the government contends that it has priority to the disputed funds because Rocky Mountain discharged any amount that would have had priority, Rich Financial's security interest in accounts receivable does not include the settlement funds with the State, and, even if Rich had an interest in the settlement funds, it was inchoate at the time the government filed the first tax lien.

Between May 5, 2003, and December 8, 2006, Rocky Mountain made \$1,510,000 in payments to Rich Financial on its line of credit. Rocky Mountain also made numerous draws on the line of credit after May 5, 2003. However, where the security is the same, payments are applied to the oldest balance first, unless otherwise designated. *United States v. Kirkpatrick*, 22 U.S. 720, 737-38 (1824); *American Investment Financial v. United States*, 364 F. Supp. 2d 1321 (D. Utah 2005) (security interest only protected for 45 days after the filing of a notice of federal tax lien).

In *Lee v. Yano*, 997 P.2d 68 (Hawaii Ct. App. 2000), the court noted that, as a "general

rule, a third person who is secondarily liable on a debt, such as a guarantor, surety, or endorser, cannot control the application which either the debtor or the creditor makes of a payment, and neither the debtor nor the creditor need apply the payment in the manner most beneficial to such person." *Id.* at 76.

Rich Financial relies on this language from *Lee* to argue that the court should not apply the presumptive rule because it is most beneficial to the government. Moreover, Rich Financial claims that the presumptive rule relied on by the government applies, if at all, only when the parties themselves have not agreed on an allocation of the payments or have not otherwise allocated the payments. *See Standard Surety & Cas. Co. v. United States*, 154 F.2d 335, 337 (10th Cir. 1946) (stating that if both parties to a contract fail to make the allocation, "then the law will make the allocation"). When the law makes the allocation according to its own notions of justice, the *Standard Surety* case explained that the correct rule is that "[w]hen the security is the same, the state and federal rule is to apply the payment first to the oldest obligation. When the security is not the same, the rule is to apply the payment first to the obligation least secured, or whose security is most precarious." *Id.*

Rich Financial claims that in the promissory notes executed by Rich and Rocky Mountain, the parties agreed on how payments would be allocated to the outstanding obligations. The allocation of payments described in the line of credit agreement, however, is: 1) costs of enforcement; 2) interest; and 3) the unpaid principal under the Note. In this case, there are no costs of enforcement and there is no dispute over interest payments. The relevant issue is how to apply payments after the perfection of the federal tax liens to the unpaid principal under the Note. The issue is not enforcement costs or interest. Here, the underlying instrument does not specify

that payments are to be applied to specific advances, nor do the payments themselves contain any such designation. In this case, the security for the line of credit was the same throughout.

Although the line of credit was renewed several times before and after May 5, 2003, the definition of security in the line of credit and the security agreement did not change. Neither Rich, nor Rocky Mountain, nor the line of credit itself, made any designation of how the payments were to be applied. Accordingly, the court must apply the general presumption and Rocky Mountain's payments are deemed to be applied against the oldest incurred advance on a first-in-first-out basis. *Kirkpatrick*, 22 U.S. at 737-38.

The question, then, becomes what was the balance owed by Rocky Mountain on the line of credit on May 5, 2003. Plaintiff provided a summary chart of all activity on this line of credit from its inception until the present date. From this chart, the amount due on May 5, 2003, the 46th day from the filing of the tax lien, is \$2,875,181.42. This amount includes debt that was incurred on several other lines of credit that were entered into with other entities controlled by Dee and Lee Bangerter and Rich Financial. Rich Financial agreed to consolidate these other obligations with Rocky Mountain's line of credit. In addition, money that was given or loaned to Lee and Dee Bangerter's mother was consolidated in Rocky Mountain's line of credit. But Rich Financial has agreed that the amount due and owing should be reduced by the \$49,086.05 paid to the Bangerters' mother. Therefore, Rich Financial asserts that the consolidated amount due and owing to it on May 5, 2003, was \$2,806,267.47.

The government, however, contends that Rocky Mountain was not obligated in any way on these other notes, and, in such a situation, any priority accorded to the line of credit between Rich Financial and Rocky Mountain would not apply to these other obligations. Rich Financial

claims that it has an oral guaranty to pay the amounts consolidated into its line of credit with Rich Financial. The government claims that the correct amount due and owing Rich Financial was \$305,959.40, which includes the amount directly received by Rocky Mountain on its line of credit minus \$118,000 that the government alleges was paid to the Bangerter's mother.

Rich Financial asserts that the government is not in a position to argue that the amount owed to Rich Financial as of May 5, 2003, should be reduced by the amounts of the notes executed by United Alternative, Nurse Network, ProMed, and the other related third-party entities that it combined with the Rocky Mountain note-receivable account. because Rocky Mountain owed Rich Financial the amounts set forth in the documents produced by Rich Financial. Rich Financial and Rocky Mountain claim that they entered into an oral guaranty agreement whereby Rocky Mountain agreed to be a guaranty on these other lines of credit and agreed to consolidate the defaulted lines of credit into its own line of credit with Rich Financial.

The government has not cited to any authority that two parties to a guaranty agreement cannot orally agree to such an obligation. Under Utah law, a party to an oral agreement to guarantee an obligation may assert the statute of frauds as a defense to the enforcement of the agreement. See Utah Code Ann. § 25-5-4(b). However, a third party cannot raise the statute of frauds defense to an oral guaranty agreement. *See Garland v. Fleischmann*, 831 P.2d 107, 109 (Utah 1992).

Representatives of both Rich and Rocky Mountain consistently testified that Rocky Mountain had, in fact, guaranteed the payment of the obligations. Also, there is no evidence that Rocky Mountain itself has ever disputed the amounts due to Rich Financial, including amounts owed to Rich Financial pursuant to Rocky Mountain's guaranty of other debtors' obligations. The

government's argument that the obligations were combined simply to make the payment obligations more convenient ignores that Rocky Mountain guaranteed the payment of the related entities' obligations to Rich Financial. The court finds no basis in the law or the factual circumstances in this case that would invalidate the alleged oral guaranty.

Given that these consolidated amounts are guaranteed by Rocky Mountain, the court must then determine whether these obligations were secured obligations under Rich Financial and Rocky Mountain's security agreement. By its terms, the security agreement provides that Rocky Mountain's payment obligations to Rich Financial include amounts of any notes executed pursuant to the security agreement "and any other obligations that now exist or may hereafter accrue from [Rocky Mountain] to [Rich Financial]."

The government argues that Rich Financial provides no authority for its proposition that oral guaranties can bring the obligations of other entities within the security agreement between Rich Financial and Rocky Mountain and that oral guaranties can defeat a properly filed NFTL. In order to defeat the general rule that the tax lien prevails, Rich Financial must show that it falls within an exception to the general rule as set out in 26 U.S.C. § 6323. There is no dispute, however, that Rich Financial has a perfected security agreement. Therefore, the issue is whether the terms of the security agreement cover those obligations. The language of the security agreement states "any other obligations." Rocky Mountain's guaranty of the other lines of credit constitute other obligations. There is no dispute between the parties to the agreement, Rich Financial and Rocky Mountain, that the guaranteed obligations reflect proper contractual obligations of Rocky Mountain to Rich Financial under the secured line of credit. Therefore, Rich Financial's security interest covering Rocky Mountain's obligations was properly perfected

before the recording of the first NFTL in the amount of \$2,806,267.47.

It is undisputed that between May 5, 2003, and December 8, 2006, Rocky Mountain made \$1,510,000 in payments to Rich Financial on the line of credit. It is clear that subsequent payments can extinguish this obligation. *See United States v. Kirkpatrick*, 22 U.S. 720, 737-38 (1824). Rocky Mountain's subsequent payments, however, are not enough to extinguish the total amount Rocky Mountain owed Rich Financial on May 5, 2003.

Next, the court must determine whether Rich Financial's security interest in Rocky Mountain's accounts receivable included Rocky Mountain's settlement proceeds from its litigation against the State and whether its interest in such proceeds were choate before the government filed its NFTL. Rocky Mountain reached its settlement with the state several years after the government filed its first NFTL.

If a security interest is to prevail over a subsequently filed federal tax lien, the interest must "exist" within the meaning of 26 U.S.C. § 6323(h)(1). To determine whether a security interest exists and has priority over a competing tax lien under the federal rule, courts look at two factors: (1) chronological priority and (2) compliance with the doctrine of choateness. *United States v. 110-118 Riverside Tenants Corp.*, 886 F.2d 514, 518 (2d Cir. 1989). Therefore, not only does the security interest need to be first in time, it must also be choate to defeat the federal tax lien.

"A lien is choate where (1) the identity of the lienor, (2) the property subject to the lien, and (3) the amount of the lien are established." *National Communications Ass'n v. National Telecommunications Ass'n*, 1995 U.S. Dist. LEXIS 5333, *42 (S.D.N.Y. April 21, 1995).

"Where the three-part test for choateness is satisfied at the time the IRS files its notice of tax lien,

or within 45 days thereafter, the state-created security interest takes priority over the competing tax lien." *Id.* at *43.

The dispute in this case is whether Rich Financial's security interest in Rocky Mountain's settlement proceeds were in existence before the federal tax lien arose. The government argues that the settlement proceeds did not come into existence until Rocky Mountain reached its settlement with the State. Rich Financial, however, argues that the settlement proceeds consist of accounts receivable that the State owed it for services rendered prior to the government's federal tax lien.

Both parties agree that Medicaid reimbursements can constitute accounts receivable. Both parties also agree that a lien on accounts receivable becomes choate, and the receivables exist, when the services giving rise to the accounts receivable are performed and payment becomes due. However, the parties dispute whether the settlement funds can be characterized as accounts receivable and whether they were choate prior to the filing of the federal tax lien.

Rocky Mountain's claims against the state was for breach of contract and breach of the covenant of good faith and fair dealing. The suit challenged the State's formula for payments on Medicaid reimbursements under Medicaid policies. Rocky Mountain sought \$16 million from the State. The parties ultimately reached a settlement in which neither party admitted fault or liability and the State agreed to pay Rocky Mountain and the other named plaintiffs \$7 million.

In *National Communications*, the court addressed a dispute over settlement funds between a party with a security interest in accounts receivable and the government, who had filed a federal tax lien. *Id.* at *61. Similar to Rich Financial, the secured party claimed that the settlement fund was simply proceeds of the preexisting accounts receivable because his security

interest was in the underlying collateral itself and his lien became choate when the debtor performed services giving rise to the debt. *Id.* The court stated that the secured party's security interest in the accounts receivable would have had priority over the federal tax lien "had there been no dispute over the payment of those accounts, and no subsequent litigation resulting in the compromise of multiple claims between the parties." *Id.* at *65. The court found that the settlement was not directly linked enough to the underlying collateral--accounts receivable. *Id.* at *67. The proceeds of the settlement fund were not specifically earmarked as settlement of the claims for accounts receivable, but rather a compromised amount for multiple claims and included monies owed under the contract and claims for damages. *Id.* Accordingly, the court found that the settlement fund represented a new asset that did not exist for priority purposes at the time the federal tax lien was filed. *Id.* The court concluded that because the settlement occurred after all the liens had arisen, the security interest lien and the federal tax lien attached to the settlement proceeds and became choate simultaneously. *Id.* at *67-68.

Rich Financial claims that this case is distinguishable from *National Communications* because Rocky Mountain's settlement proceeds consist only of payment on accounts receivables. Rich Financial relies on *Mecco Inc. v. Capital Hardware Supply, Inc.*, 486 F. Supp. 2d 537 (D. Md. 2007), in which the court concluded after a bench trial that the case was distinguishable from *National Communications* because the settlement agreement in *Mecco* referred specifically to the settlement of a claim for unpaid labor and materials and sufficiently earmarked an amount for the resolution of the claim for unpaid accounts receivable. *Id.* at 548.

The court finds this case more similar to *National Communications* than to *Mecco*. The settlement between Rocky Mountain and the State did not specifically earmark the monies as past

due reimbursements. In fact, the State did not admit to any liability and the parties agreed to exchange mutual releases for the subject matter of the litigation. The settlement agreement in this case represents a compromise reached by the parties that is not specifically earmarked as a payment of outstanding accounts receivable. The court cannot conclude that Rich Financial's security interest was choate prior to the government's filing of the NFTLS. Because both the security interest and the NFTLS were in existence at the time that Rocky Mountain and the State entered into the settlement agreement, both the security interest and the NFTLS became choate simultaneously. Accordingly, the NFTLS have priority over Rich Financial's security interest.

Based on the court's conclusion that the security interest was not choate at the time the government filed the NFTLS, the court need not address whether the settlement proceeds were in fact accounts receivable or general intangibles. The court, however, notes that this court has previously found that a claim to a tax refund was a general intangible rather than account receivable. *See In re Certified Packaging, Inc.*, 1970 U.S. Dist. LEXIS 13030 (D. Utah 1970). A cause of action is generally considered to be a general intangible. Utah Code Ann. § 70A-9a-102(42)(a).

In this case, Rich Financial had a security interest in Rocky Mountain's accounts receivable but, unlike the secured parties in *National Communications* and *Mecco*, it did not have a security interest in general intangibles. The court notes, however, that the security agreement provided Rich Financial with the right to bring an action on Rocky Mountain's behalf for collection of accounts receivable. Rich Financial, however, chose not to be a plaintiff in the action against the State. In addition, Rich Financial amended its security interest to include the proceeds of Rocky Mountain's settlement with the State after it instituted this action. Such an

amendment suggests that Rich Financial did not believe it had a security interest in the settlement proceeds under its original security agreement that was in place at the time that the government filed the NFTLs.

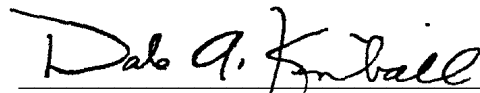
The court concludes that the government's NFTLs have priority over Rich Financial's security interest in the settlement proceeds. Accordingly, the court grants the government's Motion for Summary Judgment and denies Rich Financial's motion for summary judgment.

CONCLUSION

For the reasons stated above, the government's Motion for Summary Judgment is GRANTED, and Rich Financial's Motion for Summary Judgment is DENIED. The Clerk of Court is directed to close this case, each party to bear its own fees and costs.

DATED this 12th day of January, 2009.

BY THE COURT:

A handwritten signature in black ink, reading "Dale A. Kimball", written over a horizontal line.

Dale A. Kimball,
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAULA MASON OLSEN,
NATIONAL CITY MORTGAGE d/b/a
ACCUMORTGAGE, STATE OF
UTAH, LARRY A. PETERSON,

Defendants.

**SCHEDULING ORDER AND
ORDER VACATING HEARING**

Case No. 2:07 CV 00606 DAK

District Judge Kimball

Pursuant to Fed.R. Civ P. 16(b), the Magistrate Judge¹ received the Attorneys' Planning Report filed by counsel (docket no. [25](#)) and the declaration of Virginia Cronan Lowe (docket no. [26](#)). The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

IT IS ORDERED that the Initial Pretrial Hearing set for January 14, 2009, at 11:00 a. m. is VACATED.

****ALL TIMES 4:30 PM UNLESS INDICATED****

- | | | |
|-----------|---|----------------------|
| 1. | PRELIMINARY MATTERS | <u>DATE</u> |
| | Nature of claim(s) and any affirmative defenses: | |
| | a. Was Rule 26(f)(1) Conference held? | <u>12/10/08</u> |
| | b. Has Attorney Planning Meeting Form been submitted? | <u>12/29/08</u> |
| | c. Was 26(a)(1) initial disclosure completed? | <u>01/31/09</u> |
|
 | | |
| 2. | DISCOVERY LIMITATIONS | <u>NUMBER</u> |
| | a. Maximum Number of Depositions by Plaintiff(s) | <u>5</u> |
| | b. Maximum Number of Depositions by Defendant(s) | <u>5</u> |
| | c. Maximum Number of Hours for Each Deposition
(unless extended by agreement of parties) | <u>7</u> |

- | | | |
|----|---|-----------|
| d. | Maximum Interrogatories by any Party to any Party | <u>50</u> |
| e. | Maximum requests for admissions by any Party to any Party | <u>50</u> |
| f. | Maximum requests for production by any Party to any Party | <u>50</u> |

DATE

3. AMENDMENT OF PLEADINGS/ADDING PARTIES²

- | | | |
|----|--|-----------------|
| a. | Last Day to File Motion to Amend Pleadings | <u>01/31/09</u> |
| b. | Last Day to File Motion to Add Parties | <u>01/31/09</u> |

4. RULE 26(a)(2) REPORTS FROM EXPERTS³

- | | | |
|----|-----------------|-----|
| a. | Plaintiff | N/A |
| b. | Defendant | N/A |
| c. | Counter reports | N/A |

5. OTHER DEADLINES

- | | | |
|----|--|-----------------|
| a. | Discovery to be completed by: | |
| | Fact discovery | <u>06/30/09</u> |
| | Expert discovery | <u>N/A</u> |
| b. | (optional) Final date for supplementation of disclosures and discovery under Rule 26 (e) | <u>06/30/09</u> |
| c. | Deadline for filing dispositive or potentially dispositive motions | <u>07/31/09</u> |

6. SETTLEMENT/ ALTERNATIVE DISPUTE RESOLUTION

- | | | |
|----|---------------------------------------|-----------------|
| a. | Referral to Court-Annexed Mediation | <u>No</u> |
| b. | Referral to Court-Annexed Arbitration | <u>No</u> |
| c. | Evaluate case for Settlement/ADR on | <u>07/31/09</u> |
| d. | Settlement probability: | <u>Unknown</u> |

7. TRIAL AND PREPARATION FOR TRIAL

- | | | |
|----|---|-----------------|
| a. | Rule 26(a)(3) Pretrial Disclosures ⁴ | |
| | Plaintiff | 10/30/09 |

Defendant

11/13/09

- b. Objections to Rule 26(a)(3) Disclosures
(if different than 14 days provided in Rule)

DATE


- c. Special Attorney Conference⁵ on or before 11/27/09
- d. Settlement Conference⁶ on or before 11/27/09
- e. Final Pretrial Conference 2:30 p.m. 12/15/09
- f. Trial
- | | <u>Length</u> | <u>Time</u> | <u>Date</u> |
|----------------|---------------|------------------|-----------------|
| i. Bench Trial | <u>2 days</u> | <u>8:30 a.m.</u> | <u>01/13/10</u> |
| ii. Jury Trial | <u>N/A</u> | | |

8. OTHER MATTERS:

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine should be filed well in advance of the Final Pre Trial. Unless otherwise directed by the court, any challenge to the qualifications of an expert or the reliability of expert testimony under Daubert must be raised by written motion before the final pre-trial conference.

Dated this 12th day of January, 2009.

BY THE COURT:



David Nuffer
U.S. Magistrate Judge

1. The Magistrate Judge completed Initial Pretrial Scheduling under DUCivR 16-1(b) and DUCivR 72-2(a)(5). The name of the Magistrate Judge who completed this order should NOT appear on the caption of future pleadings, unless the case is separately referred to that Magistrate Judge. A separate order may refer this case to a Magistrate Judge under DUCivR 72-2 (b) and 28 USC 636 (b)(1)(A) or DUCivR 72-2 (c) and 28 USC 636 (b)(1)(B). The name of any Magistrate Judge to whom the matter is referred under DUCivR 72-2 (b) or (c) should appear on the caption as required under DUCivR10-1(a).
2. Counsel must still comply with the requirements of Fed. R. Civ. P. 15(a).

3. A party shall disclose the identity of each testifying expert and the subject of each such expert's testimony at least 60 days before the deadline for expert reports from that party. This disclosure shall be made even if the testifying expert is an employee from whom a report is not required.

4. Any demonstrative exhibits or animations must be disclosed and exchanged with the 26(a)(3) disclosures.

5. The Special Attorneys Conference does not involve the Court. Counsel will agree on voir dire questions, jury instructions, a pre-trial order and discuss the presentation of the case. Witnesses will be scheduled to avoid gaps and disruptions. Exhibits will be marked in a way that does not result in duplication of documents. Any special equipment or courtroom arrangement requirements will be included in the pre-trial order.

6. The Settlement Conference does not involve the Court unless a separate order is entered. Counsel must ensure that a person or representative with full settlement authority or otherwise authorized to make decisions regarding settlement is available in person or by telephone during the Settlement Conference.

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RICHARD T. KENNERLEY (11405)
Attorneys for Plaintiff
1149 West Center Street
Orem, UT 84057
Telephone: 801-222-9700
Facsimile: 801-224-9960

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH, CENTRAL DIVISION

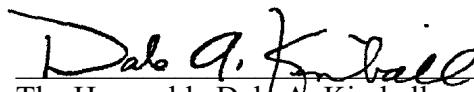
AMBERLY J. HANSEN, an individual,	:	
	:	ORDER OF DISMISSAL
Plaintiff,	:	
vs.	:	
	:	
LINCARE, a Delaware corporation,	:	
	:	
Defendant,	:	Case No. 2:07cv00845
	:	
	:	District Judge Dale A. Kimball

Plaintiff and Defendant by and through their undersigned counsel of record have agreed and stipulated that Plaintiff's complaint and claims against Defendant should be dismissed with prejudice. Based on and incorporating herein the Stipulation filed by the Parties, and for good cause shown;

IT IS HEREBY ORDERED that Plaintiff's Complaints and her claims against Defendant, filed in the above captioned matter, are dismissed with prejudice. Each party to bear its own costs and attorney fees.

DATED this 12th day of January, 2009.

BY THE COURT



The Honorable Dale A. Kimball
United States District Court Judge

STIPULATED AND AGREED

/s/Richard Kennerley

Richard Kennerley
Attorney for Plaintiff

/s/Cecilia Romero

Cecilia M. Romero
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____, 200__, I caused to be delivered via e-mail and/or mail sent first class postage prepaid, a true and correct copy of the foregoing ORDER OF DISMISSAL to the following:

Richard Kennerley
Attorney for Plaintiff
1149 West Center St.
Orem, UT 84057

Cecilia M. Romero
HOLLAND & HART LLP
Attorneys for Defendant.
60 E. South Temple, Suite 2000
Salt Lake City, UT 84111-1031

UNITED STATES DISTRICT COURT U.S. DISTRICT COURT

CENTRAL DIVISION

District of

UTAH

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

LOUIS HAMILTON

DISTRICT OF UTAH

Case Number: DUTX208CR000295.002

USM Number: 15423-081

DEPUTY CLERK

Rebecca Skordas

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1-3 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951(a) and	Hobbs Act Robbery and Aiding and Abetting		1, 2, 3
18 U.S.C. § 2			

The defendant is sentenced as provided in pages 2 through 11 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/8/2009

Date of Imposition of Judgment

Signature of Judge

The Honorable Ted Stewart

Name of Judge

U. S. District Judge

Title of Judge

1/9/2009

Date

DEFENDANT: LOUIS HAMILTON
CASE NUMBER: DUTX208CR000295.002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

63 months

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends incarceration in a facility close to Utah to facilitate family visitation.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: LOUIS HAMILTON
CASE NUMBER: DUTX208CR000295.002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: LOUIS HAMILTON
CASE NUMBER: DUTX208CR000295.002

SPECIAL CONDITIONS OF SUPERVISION

- 1) Defendant will submit to drug/alcohol testing as directed by USPO.
- 2) If testing reveals illegal drug use or excessive and/or illegal consumption of alcohol such as alcohol-related criminal or traffic offenses, the defendant shall participate in drug and/or alcohol abuse treatment under a copayment plan as directed by USPO, and shall not possess or consume alcohol during the course of treatment, nor frequent businesses where alcohol is the chief item of order.
- 3) The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: LOUIS HAMILTON
CASE NUMBER: DUTX208CR000295.002

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300.00	\$	\$ 1,982.77

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Subway 402 East 6th Ave., Suite 2A Salt Lake City, UT 84103	\$200.00	\$200.00	
Dollar Cuts 8755 So. Sandy Parkway Sandy, UT 84070	\$872.16	\$872.16	
Henries Dry Cleaners, Corporate Office 906 So. 200 West Salt Lake City, UT 84101	\$870.61	\$870.61	

TOTALS	\$	<u>1,982.77</u>	\$	<u>1,982.77</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

ADDITIONAL RESTITUTION PAYEES

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LOUIS HAMILTON
CASE NUMBER: DUTX208CR000295.002

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 300.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

\$1982.77 joint and several with codefendant Lynn Ailama Tiatia, payable in accordance with a schedule established by the BOP Inmate Financial Responsibility Program while incarcerated; and at a minimum rate of \$50/month upon release. Restitution is interest-free.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 8 - 11

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

CENTRAL DIVISION

District of

UTAH

2009 JAN 12 A 8:16

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

LYNN AILAMA TIATIA

DISTRICT OF UTAH

Case Number: DUTX208CR000295-001

USM Number: 15419-081

Filia Uipi

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1-3 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951(a) and 18 U.S.C. § 2	Hobbs Act Robbery and Aiding and Abetting		1, 2, 3

The defendant is sentenced as provided in pages 2 through 11 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/8/2009

Date of Imposition of Judgment

Signature of Judge

The Honorable Ted Stewart

U. S. District Judge

Name of Judge

Title of Judge

1/9/2009

Date

DEFENDANT: LYNN AILAMA TIATIA
CASE NUMBER: DUTX208CR000295-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

57 months

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends incarceration in a facility close to Utah to facilitate family visitation.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: LYNN AILAMA TIATIA
CASE NUMBER: DUTX208CR000295-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: LYNN AILAMA TIATIA
CASE NUMBER: DUTX208CR000295-001

SPECIAL CONDITIONS OF SUPERVISION

- 1) Defendant will submit to drug/alcohol testing as directed by USPO.
- 2) If testing reveals illegal drug use or excessive and/or illegal consumption of alcohol such as alcohol-related criminal or traffic offenses, the defendant shall participate in drug and/or alcohol abuse treatment under a copayment plan as directed by USPO, and shall not possess or consume alcohol during the course of treatment, nor frequent businesses where alcohol is the chief item of order.
- 3) The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: LYNN AILAMA TIATIA
CASE NUMBER: DUTX208CR000295-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300.00	\$	\$ 1,982.77

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Subway 402 East 6th Ave., Suite 2A Salt Lake City, UT 84103	\$200.00	\$200.00	
Dollar Cuts 8755 So. Sandy Parkway Sandy, UT 84070	\$872.16	\$872.16	
Henries Dry Cleaners, Corporate Office 906 So. 200 West Salt Lake City, UT 84101	\$870.61	\$870.61	

TOTALS	\$ <u>1,982.77</u>	\$ <u>1,982.77</u>
---------------	--------------------	--------------------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

ADDITIONAL RESTITUTION PAYEES

[illegible]

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LYNN AILAMA TIATIA
CASE NUMBER: DUTX208CR000295-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 300.00 due immediately, balance due
☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

\$1982.77 joint and several with codefendant, Louis Hamilton, payable in accordance with a schedule established by the BOP Inmate Financial Responsibility Program while incarcerated; and at a minimum rate of \$50/month upon release. Restitution is interest-free.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 8 - 11

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

CENTRAL DIVISION

District of

UTAH

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

ERNESTO MARTINEZ

Case Number: DUTX208CR000369-001

USM Number: 15573-081

Carlos Garcia

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 2 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(3)	Possession of a Firearm by an Unlawful User of or Person		2
	Addicted to a Controlled Substance		

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 1 and 3 of the Indictment ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/6/2009

Date of Imposition of Judgment

Signature of Judge

The Honorable Ted Stewart

U. S. District Judge

Name of Judge

Title of Judge

1/9/2009

Date

DEFENDANT: ERNESTO MARTINEZ
CASE NUMBER: DUTX208CR000369-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

24 months

☒ The court makes the following recommendations to the Bureau of Prisons:

Incarceration in facility where RDAP would be available to defendant

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ERNESTO MARTINEZ
CASE NUMBER: DUTX208CR000369-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ERNESTO MARTINEZ
CASE NUMBER: DUTX208CR000369-001

SPECIAL CONDITIONS OF SUPERVISION

- 1) The defendant will submit to drug/alcohol testing as directed by the probation office, and pay a one-time \$115 fee to partially defray the costs of collection and testing.
- 2) If testing reveals drug use or if the probation office determines that an assessment is necessary, the defendant shall participate in a substance abuse evaluation and treatment as recommended under a co-payment plan as directed by the probation office. During the course of treatment, the defendant shall not consume alcohol nor frequent any establishment where alcohol is the primary item of order.
- 3) The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: ERNESTO MARTINEZ
 CASE NUMBER: DUTX208CR000369-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>	
--------	----------------	----------------	--

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ERNESTO MARTINEZ
CASE NUMBER: DUTX208CR000369-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages 7 - 10

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

)	
UNITED STATES OF AMERICA,)	CASE No. 2:08-CR-576 TS
)	
Plaintiff,)	
)	ORDER GRANTING
v.)	MOTION TO CONTINUE JURY TRIAL,
)	RE-SETTING TRIAL AND PRE-TRIAL
FABIAN MARTINEZ-MONTES)	DEADLINES, AND EXCLUDING TIME
)	
Defendant)	
)	

Upon defendant Martinez-Montes' Motion the Court finds as follows. Counsel for the defendant Martinez-Montes, has received a large amount of discovery including tapes. It has been necessary to have the tapes translated and transcribed. Some of the tapes are inaudible. In reviewing the tapes, counsel for defendant believes that additional Motions may be required. The government does not oppose the continuance. Defendant Bravo-Figueroa has not filed an opposition to the continuance. The Court finds that to deny the Motion would deprive defense counsel adequate time to prepare for trial taking into account due diligence. The Court further finds that the ends of justice served by granting the requested continuance outweigh the best interest of the public and the defendants in a speedy trial pursuant to 18 U.S.C. § 3161(h)(8). Accordingly, the Court will exclude time. It is therefore

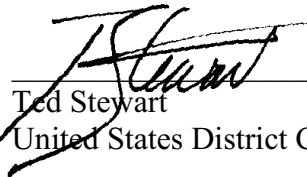
IT IS HEREBY ORDERED that the trial in this matter shall be continued from January 5, 2009 **to March 23, 2009**, and that the pre-trial deadlines in the above-entitled matter shall be reset as follows:

1. Motion deadline is reset from **November 5, 2008** to January 30, 2009;
2. Plea Agreement deadline is reset from **December 19, 2008 to March 9, 2009**;
3. Deadline for proposed jury instructions and voir dire questions is reset from **January 2, 2009** to March 16, 2009. It is further

ORDERED that the time from entry of this order through the date of the new trial shall be excluded from the calculation of time for the Speedy Trial Act.

DATED this 12th day of January, 2009

BY THE COURT

A handwritten signature in black ink, appearing to read "Ted Stewart", is written over a horizontal line.

Ted Stewart
United States District Court Judge

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

Central

District of

Utah

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

Elder Adalberto Caceres-Coello

DISTRICT OF UTAH

Case Number: DUTX 2:08-cr-00737-001

USM Number: 15866-081

Carlos A. Garcia

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) I-Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8USC§1326	Re-Entry of a Previously Removed Alien		1

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/8/2009

Date of Imposition of Judgment

Signature of Judge

Dee Benson

Name of Judge

U.S. District Judge

Title of Judge

1/12/2009

Date

DEFENDANT: Elder Adalberto Caceres-Coello
CASE NUMBER: DUTX 2:08-cr-00737-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

46 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be placed in Arizona, for family visitations.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Elder Adalberto Caceres-Coello

CASE NUMBER: DUTX 2:08-cr-00737-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Elder Adalberto Caceres-Coello
CASE NUMBER: DUTX 2:08-cr-00737-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not reenter the United States illegally. In the event that the defendant should be released from confinement without being deported, he shall contact the United States Probation Office in the district of release within 72 hours of release. If the defendant returns to the United States during the period of supervision after being deported, he is instructed to contact the United States Probation Office in the District of Utah within 72 hours of his arrival in the United States.

DEFENDANT: Elder Adalberto Caceres-Coello
CASE NUMBER: DUTX 2:08-cr-00737-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ 0.00	\$ 0.00	
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Elder Adalberto Caceres-Coello
CASE NUMBER: DUTX 2:08-cr-00737-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Pages ____ - ____

are the

Statement of Reasons,
which will be docketed
separately as a sealed
document